(1)

Supreme Court, U.S.
FILED

No. 00 585 OCT 10 2000

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IN THE

Supreme Court of the United States

DINH TON THAT,

Petitioner

v.

3D SYSTEMS, INC., A CALIFORNIA CORPORATION,
AND DOES 1 THROUGH 50 INCLUSIVE

On petition for writ of certoriari
To The Supreme Court
of the State of California

PETITION FOR WRIT OF CERTORIARI

DINH TON THAT
IN PROPRIA PERSONA
59 GREENFIELD
IRVINE, CALIFORNIA 92614
949-786-5197

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118 pp

QUESTIONS PRESENTED FOR REVIEW

1. (Defamation of employees in private sector) Whether the State of California misapplies the First Amendment to the U.S. Constitution when, through case law, it exempts employers from defamation liability to employees (in the private sector) on the ground that their otherwise defamatory statements are constitutionally protected statements of opinion or, similarly, that they are constitutionally protected subjective statements, even when the statements are loaded with defamatory elements which cannot reasonably be deemed subjective by a prospective employer or other foreseeable audience, the latter aspect being also an unreasonable violation of due process and equal protection of law. And whether the applied California case law should be overruled or otherwise reformed accordingly.

2. (Constitutionality of civil disabilities attaching to employment or rendering of personal services) Whether the State of California violates the Reconstruction (13th, 14th & 15th) Amendments to the U.S. Constitution (as well as the spirit of the Universal Declaration of Human Rights), when, through case law (and notwithstanding contrary California statutes), it creates civil disability attaching to or arising from employment or the rendering of personal services, to wit, that in entering (private sector) employment an employee, for all practical purposes except the most egregious attacks, gives up the right not to be defamed by a dissatisfied or pretext-seeking employer as well as the right to recover from the employer any and all damages to the employee's livelihood, career and dignity resulting from such defamation. Whether civil disabilities attaching to employment or the rendering of personal services are per se unconstitutional. And whether the applied California case law should be overruled or otherwise reformed accordingly.

3. (Due process and equal protection of law I) Whether the State of California denied petitioner the due process and

equal protection of the law guaranteed by the 14th Amendment to the U.S. Constitution when, in order to dismiss petitioner's cause of action for fraud (motivated by violation or attempted violation of anti-discrimination laws in employment and thus a violation of same under the doctrine of continuing violation) and resulting damage to career and employment prospects with prospective employers, its Courts invoked arguments unreasonably or arbitrarily tailored for that purpose but irrationally contradicting its previous holdings in other employer-employee jurisprudence, to wit that an employment offer which was construed and believed by the employee to be non-temporary but turned out to be temporary gave the employee no expectation of employment for any period of time and therefore no expectation of either non-temporary or temporary employment because the employer claimed the employment to be terminable at will, notwithstanding that, in order to defeat employees' claims of wrongful termination of employment claimed terminable for cause only or otherwise permanent, California Courts have ruled previously (and even in the same breath) no less than four times that employment terminable at will encompasses both temporary and non-temporary employments, a position claimed by petitioner.

4. (Due process and equal protection of law II) Whether the State of California denied petitioner the due process and equal protection of the law guaranteed by the 14th Amendment to the U.S. Constitution when, exercising its judicial power, it dismissed, on demurrer (pleadings only), petitioner's cause of action for violation of anti-discrimination laws in employment, including aiding or attempting to aid the doing thereof, notwithstanding petitioner's proffering of both prima facie evidence and *sufficient* proof, and thus more complete proof than prima facie, in accordance with petitioner's proposal to split the proof into *what* is to be proved (a connection, causal or consequential --without business justification--, to a protected status --or activity or function-- of a conduct

which ultimately injures a plaintiff) and *how* to prove it (the federal "*elimination*" method extended by a flexible "*diagnosis and verification*" method).

TABLE OF CONTENTS

	Page
Questions presented for review	i
Table of Contents	iv
Table of Authorities	v
Opinions below	1
Jurisdiction	1
Constitutional and Statutory Provisions invoked	1
STATEMENT OF THE CASE	1
Procedural History	2
QUESTION 1: Defamation of employees in the private sector	10
QUESTION 2: Civil disability attaching to employment	15
QUESTION 3: Due process & equal protection of law I	23
QUESTION 4: Due process & equal protection of law II	26
APPENDIX	31
Opinion of California Court of Appeal	32A
Court of Appeal denies motion	42B
Court of Appeal denies rehearing	43C
California Supreme Court denies review	44D
California Superior Court denies clarification and reconsideration	45E
Superior Court hears clarification and reconsideration	46F
Superior Court enters judgement for defendant	49G
Opinion of Superior Court sustaining demurrer	51H
Superior Court hears demurrer to 1st Amended Complaint	57I
Superior Court partially sustains demurrer to Original Complaint	64J
Superior Court hears demurrer to Original Complaint	65K
Tentative Ruling of Superior Court on demurrer to Original Complaint	67L
UNITED STATES CONSTITUTION	70M

UNITED STATES CODE 73N
CALIFORNIA CONSTITUTION 86O
CALIFORNIA CIVIL CODE 86O
CALIFORNIA GOVERNMENT CODE 89P
CALIFORNIA LABOR CODE 100Q
FLORIDA STATUTES 102R
UNIVERSAL DECLARATION OF HUMAN RIGHTS 103S

TABLE OF AUTHORITIES

CASES

Accardi v. Superior Court (1993)
17 Cal. App. 4th 341 24
Auto Workers v. Johnson Controls (1991)
111 S. Ct. 1196 27
Banks v. Dominican College (1995)
35 Cal. App. 4th 1545, 1554 8, 11, 15, 23
Brown v. Kelly Broadcasting Co. (1989)
48 Cal.3d 711, 746 10
Camp v. Jeffer, Mangels, Butler & Marmaro (1995)
35 Cal. App. 4th 620, 639-640 24, 25
Davis v. Consolidated Freightways (1994)
29 Cal. App. 4th 353 23, 25
Edwards v. Hall (1991)
234 Cal.App.3d 886 12
Ewing v. Gill Industries (1992)
3 Cal. App. 4th 601 28
Furnco Construction Corp. v. Waters (1978)
98 S.Ct. 2943 29
Gardner v. Celanese Corp. of America (1953)
88 Ga App 642, 76 SE 2d 817 5
.Gertz v. Robert Welch, Inc. (1974)
94 S. Ct. 2997 6, 11, 12

Gregory v. McDonnell Douglas Corp. (1976)
17 Cal. 3d 596, 604 2, 6-8, 10-11, 15
Gunsul v. Ray 6 Cal. App. 2d 528 (1935) 15
Guz v. Bechtel National, Inc. Oct. 5, 2000
S062201 ? Cal. 4th ??? 25
Heard v. Lockheed Missiles & Space Co. (1996)
44 Cal. App. 4th 1735 28
Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174 5
Jensen v. Hewlett-Packard Co. (1993)
14 Cal. App. 4th 958, 969 2, 4, 6-12
Kahn v. Bower (1991)
232 Cal. App. 3d 1599 3, 4, 12-13
Lazar v. Superior Court (1996) 12 Cal. 4th 631 5
Lin v. Circuit City (19950 68 F.E.P. (BNA) 571
(reversed in part in Xi Lin v. Circuit City, Inc. 106 F.3d
412 (C.A.9(Cal.) 1996) 4
Maher v. Devlin 203 Cal. 270 15
Martin v. Lockheed Missiles & Space Co. (1994)
29 Cal. App. 4th 1718, 1735 9
McDonnell Douglas Corp. V. Green (1973)
93 S. Ct. 1817 29
McKinney v. County of Santa Clara (1980)
110 Cal. App. 3d 787 4, 10
Milkovich v. Lorain Journal Co. (1990)
110 S. Ct. 2695 7, 11-13
Miller v. Pepsi-Cola Bottling (1989)
210 Cal. App. 3d 1554, 1558-9 23, 25
New York Times Co. v. Sullivan 84 S. Ct. 710 11
Polygram Records, Inc. v. Superior Court (1985)
170 Cal.App.3d 543 29, 7, 12
Price Waterhouse v. Hopkins (1989) 109 S.Ct. 1775 28
Robomatic Inc. v. Vetco Offshore (1990)
225 Cal. App. 3d 270, 276 8
(Dred) Scott v. Sanford 60 U.S. 393 (1856) 18, 20-21
Tameny v. Atlantic Richfield Co. (1980)
27 Cal. 3d 167 27
Teamsters v. United States (1977) 97 S.Ct. 1843 29
Tollefson v. Roman Catholic Bishop of San Diego
(1990) 219 Cal. App. 3d 843, 856 23, 25

U.S. Postal Service Bd. Of Govs. V. Aikens (1983)
103 S.Ct. 1478, 1483 29

CONSTITUTIONS AND STATUTES

U.S. Const. First Amendment
U.S. Const. Thirteenth Amendment 18-19
U.S. Const. Fourteenth Amendment 14-15, 18-19, 23-30
U.S. Const. Fifteenth Amendment 18-19
42 U.S.C. 1981 18
42 U.S.C. 2000e 27
California Const. Art. 1.2(a) 10
Ca. Civ. Code § 43 10, 23
Ca. Civ. Code § 44-46 10, 14, 17
Ca. Civ. Code § 47(c) 3-4, 7-8, 10, 13, 16
Ca. Civ. Code § 1668 13
Ca. Gov. Code § 12920 et seq (F.E.H.A.) 27
Ca. Gov. Code § 12921 9, 24
Ca. Gov. Code § 12940(a) 3, 6
Ca. Gov. Code § 12940(g) 3, 6, 9-10, 27
Ca. Gov. Code § 12941.1 9
Ca. Lab. Code § 1050-1053 10, 13-14
Ca. Lab. Code § 2922 25-26
Florida Statutes § 768.095 7, 13-14
Universal Declaration of Human Rights 18, 21-22
Univ. Declar. Hum. Rights §12 21-22
Univ. Declar. Hum. Rights §23 22

OTHER

Rest. 2nd Torts § 563 com. c 7, 12

OPINIONS BELOW

Opinions below are unpublished and appear in the Appendix herein as: California Court of Appeal affirms judgement for defendant (A Opinion), denies rehearing (C), California Supreme Court denies review (D), Court of Appeal denies Appellant's motion (B), Superior Court hears plaintiff's motions for reconsideration and clarification (F), enters judgement for defendant (G) after ruling (H) to sustain demurrer to 1st Amended Complaint, hears (I) demurrer to 1st Amended Complaint, hears (K) demurrer to Original Complaint, after tentatively ruling (L) to partially sustain demurrer to Original Complaint.

JURISDICTION

The California Court of Appeal, 2nd District, Division 7, affirmed judgement on April 25, 2000. Petitioner timely petitioned for rehearing on May 10, which was denied on May 12, 2000. Petitioner timely petitioned for review by the California Supreme Court on June 5, 2000, which was denied on July 12, 2000. This Court has jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED OR *CITED*

The pertinent portions thereof appear in the Appendix as: First, Thirteenth, Fourteenth, Fifteenth Amendments to the United States Constitution (M), 42 U.S.C. *§1981, 2000e et seq.* (N), California Constitution Art.1.1-1.2, Ca. Civil Code § 43, 45-47 (O), Ca. Government Code § 12920, 12921, 12940, 12941.1 (P), Ca. Labor Code § 1050-1053, 2922 (Q), Universal Declaration of Human Rights (S).

STATEMENT OF THE CASE

Petitioner Dinh Ton That alleges:

In 1995 3D Systems, Inc., a California corporation, ("3D") ostensibly hired him as a non-temporary employee without disclosing to him its real intent of hiring him temporarily only and despite his in-interview offer of working on a temporary basis for a preliminary period. 3D did so to prop up its appearance of compliance with antidiscrimination laws in employment. Relevant is his being presented to staff as a regular employee, the

departure, shortly before, of a productive long-time Asian employee for career advancement with a business partner of 3D, and the substantial concentration of protected status (national origin) persons among its temporary workforce, as well as 3D's president reservation about his candidacy and his supervisor-to-be's vagueness about job responsibilities during the job interviews.. Despite his offers, 3D denied him opportunities, available to non-temporary employees, to exercise his skills in a manner which would enhance his career at 3D and favored, beyond qualifications, a Caucasian co-worker over Asian employees (including himself). About a year later, 3D demanded his resignation after blaming him for the Caucasian co-worker's performance and by threatening to "put a stain on his resume". He protested. As he had not resigned, 3D produced a defamatory performance evaluation and put him on probation. Despite his conscientious and high quality performance (before -- e.g. patents -- and) during probation, 3D, after deliberately hindering his progress, produced a defamatory probation report and in October 1996 told him not to come back for work. Prospective employers wonder at the brevity of his employment by and with 3D, and in August 1997, after he declined to discuss the reason for leaving 3D (referring the recruiter to 3D), the recruiter stopped the interview, after first saying petitioner's refusal to discuss same conveyed a sense of dishonesty and lack of trustworthiness and then "Think about this overnight, if you change your mind, let me know and the interview shall resume".

In October 1997 petitioner filed a complaint in the Superior Court for Los Angeles County, California against 3D for fraud, violation of antidiscrimination laws in employment, defamation by self-publication and breach of the covenant of good faith and fair dealing. 3D demurred without answer, arguing fraud was really wrongful termination negated by terminability at will, that he was speculating, that statements were either protected as subjective opinions *Jensen v. Hewlett Packard* 14 Cal.App.4th 958 (1993) , *Gregory v. McDonnell Douglas Corp.* 17 Cal.3d 596 (1976) or else (qualifiedly) privileged, that

terminability at will negated breach of the covenant. In opposition he insisted that the fraud occurred at the beginning, he pointed out that Ca.Gov.Code § 12940(g) outlawed aiding or attempting to aid violation of antidiscrimination laws, that the 1994 amendment "based upon credible evidence" to the "without malice" qualified privilege Ca.Civ.Code § 47(c) negated the subjective-opinion defense, that malice was shown when he was knowingly blamed for someone else's performance, and he presented performance evaluation and probation report as exhibits, saying these were peppered with "assertions of facts" which were false and more evidence was coming, that an employee can rightly expect fairness in a performance evaluation. The Superior Court (The Hon. Florence-Marie Cooper, J. presiding), taking notice of 3D's claim of terminability at will, issued a tentative ruling (L) sustaining w/o leave to amend demurrer to fraud and breach of the covenant. It acknowledged claim of fraud at beginning, but required him to plead a promise of permanent employment (negated by terminability at will). It commented about speculation and allowed amendment to show discriminatory animus and defamatory language. Just before oral argument, 3D, through its Counsel, asked petitioner to negotiate a settlement, so there was no argument, instead the Court was asked for negotiation time and extended time for amendment (K). The negotiations were not fruitful. Upon amendment of complaint for violation of antidiscrimination laws and defamation, 3D demurred on the same grounds. This time, petitioner dissected the violations into three groups, two involving Ca.Gov.Code § 12940(g) ("aiding"), the other § 12940(a) ("standard discrimina-tion: favoritism") and laid out proof for each of them. He also detailed facts and malice to show defamation and pointed out "There is no categorical exception from defamation liability for expression of opinion under California law" *Kahn v. Bower* 232 Cal.App.3d 1399 (1991), that a statement is judged according to its factual content, not whether it is an opinion, that 3D had not pointed to a single statement which can only be interpreted as pure opinion,

that 3D's claim was a blanket claim negated by *Kahn*, that relativity of standard was not the same thing as subjectivity (comparison between specimens can still be made) and that prospective employers enquire with former employers not for their exercise in pure opinion but for concrete comparison (of employees). He also complained that in 1993 *Jensen* had created a civil disability attaching to employment (see details in the argument), impliedly rejected by the Legislature when it added "based upon credible evidence" to the "without malice" of qualified privilege Ca.Civ.Code § 47(c). He also asked for leave to add interference with prospective economic advantage, should the blanket opinion defense be upheld. He also emphasized that the doctrine of defamation by self-publication *McKinney v. County of Santa Clara* 110 Cal.App.3d 787 (1980) had not been overruled. 3D filed a reply insisting that the model of discriminatory firing be used. At oral argument petitioner strenuously objected to the discriminatory firing model and stuck to his proposed proofs for the three groups of violation; he also pointed out that out of self interest one of the employers cited by 3D *Lin v. Circuit City* 68 F.E.P. (BNA) 571 (reversed in part in 106 F.3d 412 (C.A.9 (Cal.) 1996)) tried to use statements of "fact" rather than opinion to "(salt) audit" its technicians' "opinions" of the difficulty of electronic repair jobs. The Superior Court (The Hon. Soussan G. Bruguera, J. presiding) recognizing only the traditional method of proof (valid for standard discrimination but not appropriate for "aiding or attempting to aid" violation) insisted on evidence of discriminatory animus against petitioner or (racially) hostile work environment (overlooking petitioner's third group of violations "favoritism" still) and termed his method and offer of proof (of the two groups "aiding violation") speculation. It also ruled that 3D's statements were protected statements of opinion. It sustained demurrer to 1st Amended Complaint w/o leave to amend (I,H) after asking 3D's Counsel to write the ruling. In the ruling 3D went beyond the Court's pronouncements (e.g. the Court had not discussed self-publication or qualified privilege) but

the Court signed it anyway. Petitioner asked (F,G) for reconsideration and clarification to add interference with economic advantage, and a stay of entry of judgement. The Court entered judgement for defendant anyhow, on July 27, 1998. Notice of appeal was filed on September 26, 1998.

On appeal, petitioner reiterated the points made before the Superior Court, and critically analyzed the bases for the Superior Court's ruling. As to fraud, he pointed out that terminability at will was consistent with both temporary and non-temporary employment (justifying reliance), that terminability at will meant there was no contractual damage from termination of employment or its necessary consequences, but fraud, as a tort, was not dependent on existence or breach of contract, and that, as a result of 3D's conduct (including failure to disclose despite his in-interview offer) there was tortious damage (prospective employers' concern about brevity of employment) separate from the necessary consequences of the termination. He also pointed to *Lazar v. Superior Court* 12 Cal.4th 631(1996) as support for the above argument and limiting *Hunter v. Up-Right, Inc.* 6 Cal.4th 1174 to cases of terminal bad faith causing no damage other than the termination itself. A non-California case is *Gardner v. Celanese Corp. of America* 88 Ga. App 642, 76 SE2d 817 (1953). 3D complained that new facts were being raised, so with the reply brief, he filed a motion for equitable estoppel on account of 3D's asking him to negotiate a settlement just before oral argument before the Superior Court resulting in no oral argument therein, in the alternative he asked for judicial notice of generality or specific judicial notice of case law supporting his position that terminability at will encompasses both temporary and non-temporary employments. The motion was denied on March 21, 2000 (B). The Court of Appeal dismissed fraud on the ground that terminability at will meant he had no expectation of employment for any period of time, i.e. whether temporary or non-temporary employment. The Court of Appeal also ignored petitioner's invocation of *Lazar*, choosing to stick to *Hunter*, despite clear evidence of damage separate from necessary

consequences of termination. As for violation of antidiscrimination laws, he formalized his proposed proofs into a system of *what* to prove (a causal connection of 3D's conduct to his protected status --race/ethnic origin, age-- with resulting damage through the fraud, cover up and defamation) and *how* to prove it (by a combination of elimination and diagnosis methods of inference and verification), and he painstakingly went step by step through the evidence to provide sufficient proofs of the first two groups of violation ("aiding" Ca.Gov.Code § 12940(g)). Sufficient proofs are more complete than prima facie because they consider *all* symptoms rather than a subset. As for the third group ("favoritism" Ca.Gov.Code § 12940(a)), a prima facie case was made. 3D stuck to the speculation defense and discriminatory firing model. Like the Superior Court, the Court of Appeal insisted on proof of discriminatory animus or racially hostile work environment, neither of which is appropriate for "aiding or attempting to aid violation"and ignored petitioner's proffered system of, and actual, proofs appropriate for "aiding violation" calling them speculation. Like the Superior Court, it ignored his invocation of Ca.Gov.Code §12940(g) altogether. As for defamation by self-publication, he reiterated his points below, including the invalidity of the subjective opinion defense and his objection to creation of civil disability attaching to employment. Since the Superior Court had invoked "protected statements of opinion", he painstakingly showed that every attempt by *Jensen* to justify exempting employers from liability for defamation of employees was erroneous, that the subjective opinion defense was fallacious, that *Jensen* had imported the subjective opinion defense from *Gregory*, that *Gregory* had imported its version from the *Gertz v. Robert Welch, Inc.* 94 S.Ct. 2997 (1974) dictum

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.",

a misuse which was rejected by this Court in *Milkovich v. Lorain Journal Co.* 110 S.Ct. 2695, 2706 (1990).He also emphasized that *Jensen* and progeny contradict California statutes against defamation or protecting employees therefrom. Reviewing the legislative history of the 1994 amendment "based upon credible evidence" to Ca.Civ.Code § 47(c), he pointed out that it arose from the Legislature's rejection of an attempt to import the Florida model Stat. §768.095 (R) of presumption of employer's good faith rebuttable only by clear and convincing evidence (as compared to preponderance of evidence), that *Jensen* was worse than the Florida model, and therefore impliedly rejected also. He also detailed both defamatory statements and evidence of malice. In its response brief, 3D repeated its subjective opinion defense, including citations pertaining to public debate concerning public officials, public figures and subject of public controversy. In his reply brief, he separated 3D's citations into two groups, one being public debate concerning public officials, public figures, subjects of public controversies, the other being the *Gregory-Jensen* and progeny line of statement of opinion. He objected that employees in the private sector are not public officials, public figures, or subjects of public controversy, and should not therefore be subject to the standard of public debate. As for the *Gregory-Jensen* line of statement of opinion he pointed to the rejection of the opinion-statement of fact dichotomy by this Court in *Milkovich* as well as to the inherent fallacy of the subjective opinion defense itself. He also pointed to the traditional law of defamation applicable between private parties which does not recognize an opinion or subjectivity defense (cf. *Milkovich* at 2702-2703), holds that defamation depends on "whether the statement could reasonably be perceived in a defamatory sense by those who received it" (Rest. 2d Torts § 563, com. c) *Polygram Records, Inc. v. Superior Court* 170 Cal.App.3d 543, 554. He also pointed out that speech, like all other freedoms, has its limitations, so impunity for opinion, if at all, should be reserved for public debate where it can do more good than harm; however, employees in the private sector are not

public officials or figures or subjects of public controversy. The Court of Appeal, however, stuck to the *Gregory-Jensen* line of subjective (opinion) statements (*Banks v. Dominican College* 35 Cal.App.4th 1545 (1995), a case perhaps involving personality problems or mental instability merely echoes *Jensen* without attempting justification) and recited *Jensen's* labeling all evaluations subjective, notwithstanding their clearly factual (though false) content. It also ignored his showing of at least three separate evidences (Record on Appeal Clerk's Transcript Original RCA CTo p 97 ¶ 34: the widely circulated memo of December 1995 announcing the assumption of leadership by Bedal, Kelly Kwo's dual reporting to Leyden and Bedal, Leyden's business trip with 3D's president and Bedal, Leyden's awareness of another business trip co-led by Bedal) that 3D's Leyden knew the leadership had been given to Bedal rather than petitioner when he blamed him for Bedal's leadership; such blame could not have been made in good faith; and Leyden's knowledge of Bedal's leadership is evidence of malice on 3D's part. This evidencing of malice can be repeated again and again from the evaluations in like manner. The Court of Appeal ignored them all, however. It also cited 3D's citation of the 1990 case of *Robomatic, Inc. v. Vetco Offshore* 225 Cal.App.3d 270,276 while ignoring all of his proffered evidence of malice, and ignoring his pointing to the 1994 Ca.Civ.Code § 47(c) amendment adding "based upon credible evidence" to "without malice", thus privilege is lost if evidence contradicts a statement, and it is then not necessary to inquire about malice or ill will (petitioner provided very detailed evidence contradicting 3D's statements). Such systematic ignorance raises questions of due process. The Court of Appeal also refused to recognize an employee's expectation of fair dealing in performance evaluation by an employer. It affirmed judgement for defendant. In a petition for rehearing, petitioner pointed out the aforesaid errors, including omissions and misstatements, emphasizing that the parole evidence rule does not apply to fraud by concealment, terminability at will is uncertain (because the term is unspecified), such vagueness raises

concern about impact separate from termination or its necessary consequences, and the employer has a duty to disclose its real intent when the job candidate seeks reassurances to minimize impact separate from the necessary consequences of the termination of employment, emphasizing the Court's refusal to apply Ca.Gov.Code § 12940(g) which is part of the civil right declared in § 12921, the inappropriateness of the model of proof applied, that the citation *Martin v. Lockheed Missiles & Space Co.* 29 Cal.App.4th 1718, 1735 (1994) was a case of summary judgement rather than demurrer, with different levels of proof, that *Martin* was a case of selective termination and petitioner had objected to the discriminatory firing model as inappropriate, that *Martin*'s repartition of faith and credit to each party seemed one-sided, especially by summary judgement standards, and that Martin may have allowed cost reduction as excuse for age discrimination, a practice now banned Ca.Gov.Code § 12941.1, emphasizing that subjective statements can still impair an employee's ability to compete with other employees, that both and *Jensen* and the instant Court did not distinguish between statements of expectations or suggestions, which may be subjective to employers, and evaluations of an employee's habits, skills, performance, which may be falsified by the employer, thereby defaming the employee if derogatory and recapitulating the errors in Jensen.

Petitioner's petition for review[1] by the California Supreme

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[1] He reiterated the various points above with the following amplifications. A quasi- mathematical analysis of mutual exclusivity (as an indicator of unjustified reliance) of terminability at will on one hand and fixed term or terminability for good cause only or permanent employment on the other, showing however that terminability at will was not mutually exclusive with either temporary terminable at will or non-temporary termnable at will employment. In the face of a claim of fraudulent concealment, an employer's claim is narrowly construed for its necessary, exclusive consequences, i.e. exclusion of terminability for good cause only, fixed-term or permanent employment, but not excluding non-temporary terminable at will employment and fraudulent

Court was denied on July 12, 2000 (D).

QUESTIONS PRESENTED FOR REVIEW

Question 1. Defamation of employees in private sector

Defamation is one of three federally recognized content-specific exceptions to freedom of speech. It is abuse of speech under California Constitution Art. 1.2(a), and a constitutional right to one's reputation has been recognized under the California Constitution *Brown v. Kelly Broadcasting Co.* 48 Cal.3d 711, 746 (1989) & Ca.Civ.Code § 43 , so federal standards of free speech are also California standards *Brown*. The Federal constitutional question is particularly important because it enables California courts to ignore California statutes defining defamation for everyone Ca.Civ.Code § 43, 44-46, protecting employees from defamation by employers Ca.Lab.Code § 1050-1053 and the 1994 "based upon credible evidence" Amendment to the traditional "without malice"qualified communication privilege between interested parties (Ca.Civ.Code § 47(c)), as well as common law such as the doctrine of defamation by self-publication *McKinney*, the existence of tortious bad

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concealment should stand. The contradiction between previous court rulings that terminable at will employment encompasses both temporary and non-temporary employment and the ruling in the instant case that a terminable at will employee has no expectation of employment for any particular length of time, and thus neither temporary nor non-temporary employment is symptomatic of a miscarriage of justice, such as claiming one thing here then denying it there merely to deny a plaintiff's claim. He had now formalized a system of what to prove in and how to prove violation of antidiscrimination laws in employment, including Ca.Gov.Code § 12940(g) "aiding violation" and proffered detailed sufficient proofs for two groups and prima facie in a third. He asked that Jensen (and progeny) be overruled and Gregory limited or reformed. In reviewing the jurisprudence post- Gregory, he noted that in the decade following Gregory, the lower courts limited its application to cases of public debate involving public officials, public figures, subjects of public controversy or debate before labor unions, and the like, and that they all analyzed the speech for its public debate value or content before labeling it opinion. Seventeen years later, Jensen invoked Gregory but did neither: this double major error was reason to overrule Jensen and its progeny altogether. Moreover, he again complained about Jensen having created a civil disability attaching to employment.

faith separately from contractual bad faith, etc.

Petitioner's objections to, and both Superior Court and Court of Appeal's invocation of, the subjective opinion defense have been detailed at length with notation of when the objection or invocation were made in the Statement of the Case, and will not be repeated here for the sake of brevity. Additional comments are as follows.

Gregory which relies on the *Gertz* dictum[2] rejected in *Milkovich* should be limited by this Court to its original purpose, namely extension of federal standards of public debate (see *New York Times v. Sullivan* 84 S.Ct. 710) concerning public officials, public figures, subjects of public controversy to debate before labor unions, ***and no more***. Otherwise, the *Jensen* double major error of applying *Gregory* to cases not involving public debate (public officials, etc.) is likely to happen again and again, to the grief of people who are not public officials or the like. *Jensen* (and progeny such as *Banks*) should be overruled altogether because its double major error disconnects it from the jurisprudence of protected speech altogether (see also Question No. 2) and because they claim constitutional protection. *Jensen* was a case of premature claim of defamation before causation. Beside the constitutional argument, it tried to justify abolition of employer defamation against employees except for the most egregious attacks but petitioner has explicitly shown the error, fallacy or contradiction of California statutory law of every attempted justification therein). *Gregory* itself was aware of the weakness of the opinion defense (opinion-fact dichotomy), since every statement can be an opinion, hence the need for analyzing speech of public debate for its public debate value or content before labeling it protected opinion. Otherwise, labeling the speech opinion becomes a meaningless exercise since every statement can be an opinion

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[2] **This mention of the Gertz dictum as basis for the constitutional protection gives this Court jurisdiction, since invocation of federal law or federal constitution by a State court as basis creates such jurisdiction, irrespective of the pleadings.**

-- since belief, even feigned, is all that is required --, but being an opinion cannot change the true/false character of a statement. Employees in the private sector are generally not public officials, public figures, subjects of public controversy or running for office in a labor union. As such, the traditional law of defamation[3] applies to employer speech concerning an employee, and neither opinion nor subjectivity is a defense under thereunder. The 1993 *Jensen* Court of Appeal was aware of (but somehow chose to ignore) the 1990 repudiation of the opinion defense by this Court in *Milkovich*. Indeed two California Courts of Appeal (*Kahn supra* and *Edwards v. Hall* 234 Cal.App.3d 886 (1991)) had acknowledged *Milkovich*, *Kahn* observing that California law does not recognize an opinion defense other than the federal *Gertz* dictum quoted by *Gregory* and now obsoleted by *Milkovich*. Subsequent California Courts of Appeal trying to save the opinion defense, *Milkovich* notwithstanding, have resorted to two devices: (a) the use of the code words "fact" and "non-fact" in the place of "non-opinion" and "opinion", (b) the use of "subjective" or "subjectivity", synonyms for the now taboo word "opinion", as a criterion for "non-fact" (i.e. opinion). For example, one might say "this statement is subjective and therefore non-factual" as a way of avoiding "this statement is an opinion"; however, the traditional law of defamation does not recognize an opinion or subjectivity defense: (a) one is supposed to be aware of the defamatory potential of one's statements, (b) whether defamation occurs depends on how the statement is perceived or likely to be perceived by the potential audience or readership, not on what the speaker or author holds as opinion or subjective expression.

Petitioner has strenuously objected to the

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[3] Citations of the California law of defamation can be found in *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543. Particularly relevant is "...the threshold inquiry is simply whether the communication in question could reasonably be understood in a defamatory sense by those who received it. (Rest. 2d. Torts supra § 563, com c)" ibid. at 554.

opinion/subjectivity defense at all levels. (See Statement of the Case). In the Superior Court (RCA-CTo143-152), he pointed out that relativity (of standard) is not the same thing as subjectivity[4].

At the appellate level, petitioner reiterated all his objections to the opinion/subjectivity defense and specifically pointed to the rejection of the opinion-fact dichotomy by this Court in *Milkovich*. He also painstakingly showed that every justification attempted by *Jensen* was erroneous[5].

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[4] Even scientific measurements, the epitome of statement of fact, are relative to a standard, namely the unit of measure (unit of time, unit of length, etc.), but one can still compare different specimens with regard to size, age, etc. all of which are facts in law. Moreover, even scientific measurements are tainted with possible error, in the same way that an evaluation can be tainted by opinion; however, both error and taint of opinion can or should be minimized. Indeed, a prospective employer seeks a former or current employer's evaluation of a job candidate not for its subjective nature but for its predictive factual content of habits, skills, actual performance, etc.

[5] An objectively wrong performance evaluation is not valuable feedback but useless to the employee (or anyone else except wrongdoers) because the employee cannot use it to predict how modifying performance can lead to greater rewards for and from the employer due to lack of correlation between actual performance and additional rewards. An agreement to excuse employer labeling employee or employee performance any way the employer wants according to whim or caprice would violate public policy (Ca.Lab. Code § 1050-1053, Ca.Civ.Code § 47(c)(amend. 1994), Ca.Civ.Code § 1668) and be void and unlawful. [Fallacy of the opinion/subjectivity defense:]Any statement can be believed and thus be an opinion, but belief in a statement cannot per se change its true/false character; a statement may be neither true nor false because it cannot be proved or disproved, but this has nothing to do with whether it is an opinion or not. The *Kahn-Milkovich* objection to opinion-fact dichotomy. An evaluation can defame because of its predictive power (for prospective employers), a combination of apparently innocent statements can be defamatory. The traditional law of defamation already tolerates communication of good-faith opinions between interested parties. The 1994 "based upon credible evidence"Amendment to Ca.Civ.Code § 47(c) arose from a rejection of the Florida model Stat. § 768.095 of presumption of good faith of employers rebuttable only by clear and convincing evidence, and

With regard to unreasonable violation of due process of law (14th Amendment to U.S. Constitution), the Court of Appeal in the instant case elaborated on the Superior Court's "protected statements of opinion" by alluding to subjective statements. In a petition for rehearing as well as in a petition for review by the California Supreme Court, petitioner pointed out that while statements of "expectations and suggestions" might be subjective to the employer, performance evaluations are loaded with statements concerning the employee's habits, skills, performance, etc., and the latter can be falsified by the current employer (e.g. for a cover up -- pretextual reasons --) and perceived by a prospective employer or similar audience in a defamatory way. It is therefore unreasonable and irrational to declare all performance evaluations subjective and protected merely because they may contain statements of the employer's expectations or suggestions. Prospective employers do not care for the previous employer's expectations or suggestions, they want to know habits, skills, performance, etc. Petitioner summarized this point as follows: an employer can at any time tell the employee "this is my whim or caprice at this moment, do as I tell you", but an employer has no right to label an employee or an employee's performance any way the employer wants, according to whim or caprice; *Jensen* implies as much, and does so in contradiction of California statutes protecting employees from such e.g. Ca.Lab. Code §§ 1050-1053. Echoing his argument that relativity of standard does not prevent concrete comparison, petitioner argued in petitions for rehearing by the California Court of Appeal and review by the California Supreme Court that a subjective statement can defame an employee by impairing

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impliedly rejects Jensen (1993) also since Jensen is analogous to or worse than the Florida model by immunizing employer bad faith from tort damages altogether. Jensen contravenes Ca.Civ.Code §§ 45, 46, Ca.Lab. Code §§ 1050-1053: incompetence can be implied without ever using the word incompetent or incompetence such as by using a defamatory combination of statements artfully phrased to appear individually innocent or by resorting to suggestive statements in context of contemplated or threatened dismissal or similar action.

that employee's ability to compete with other employees. Thus, this unreasonableness is a violation of due process of law (14th Amendment to the U.S. Constitution) and warrants reversal by this Court of the California Courts' judgement. Although federal jurisprudence considers damage to reputation alone as lesser than disparagement of fundamental rights, it considers unreasonable damage to reputation a violation of due process or equal protection when the damage extends to economic damage beyond damage to reputation only, as is the case in the employment context where the employee's livelihood and career are likely to be seriously affected by the defamation.

As stated earlier, *Jensen, Banks* and progeny should be overruled, and *Gregory* limited (see also question no. 2). to the extent that they may be invoked as basis for an opinion defense under the federal Constitution when the target is not a public official, a public figure, or the subject of a public controversy, or participating in a debate before a labor union.

Also, it may not be impossible to state federal standards without referring to "fact" or "non-fact"[6].

Question 2. Civil disability attaching to employment

Although the California Courts in the instant case have not raised this issue, petitioner did so in response to and in protest of defendant's invocation of the *Jensen* ruling. In Opposition to defendant's demurrer, petitioner argued (RCA-CTo145-146):

> It is further recognized that allegation of criminality or of dishonesty is not necessary for a claim of defamation *Gunsul v. Ray* (1935) 6 Cal.App.2d 528, *Maher v. Devlin* (1928) 203 Cal.270.
>
> In 1993, the Court of Appeal[s] created a civil

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[6] (1) Is it a public debate concerning a **public official, public figure or subject of public controversy** ? If so, **plaintiff needs to show** that the statement complained of **is false**, was made with actual malice, was perceived in a defamatory sense by the audience or readership, and damaged reputation or more.

(2) If not a public debate concerning one of the above, the traditional law of defamation applies.

disability attaching to employment. In *Jensen*... the Court of Appeal[s] introduced a new era where employer communications to employee are presumed to be always opinion except for accusations of criminality or dishonesty. Even ordinary citizens of this State can seek redress for defamation for lesser accusations than crime or dishonesty, but in accepting employment the employee forgoes this civil right. ...[7]

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[7] ... This civil disability leads to major difficulty in other areas of the law, however: if all employer evaluations short of accusation of crime or dishonesty are always opinion, how can they be used in defending against an employee's claim of discrimination or violation of other public policy ? From Jensen, employer evaluations, as a matter of law, being opinion, would be inadmissible evidence for an employer to present in such defense, but can be used by the employee to show an employer's prejudice or illegal conduct; how does one instruct a jury that it can consider a piece of evidence only for one side but not the other ? Furthermore, declaring employer evaluations short of accusations of criminality or dishonesty to be always opinion makes the privilege of Civ.Code § 47(c) unnecessary: prior to *Jensen*, an employer would be circumspect in its communications, limiting itself to requests from prospective employers and making sure that the communication was made without malice, a civil right available to all, after *Jensen*, an employer could now broadcast any evaluation short of accusation of criminality or dishonesty to the entire world without fear of defamation liability since the evaluation is presumed to be an opinion and cannot be proved or disproved ! One year later, in 1994, the State Legislature, rather than dispensing with Civ.Code § 47(c) in the area of employment, instead tightened Civ.Code § 47(c) by substituting the qualification "based upon credible evidence, made without malice" to the previous "made without malice" criterion for (former) employer communication to prospective employers; this tightening is not available to other areas of civil life. If the State Legislature had accepted the "always an opinion, short of accusation of criminality or dishonesty" interpretation of Jensen, it would not have bothered to so amend Civ.Code § 47(c). Furthermore how can one make that which is always deemed by the courts to be an opinion, which cannot be proved or disproved, to be by statute "based upon credible evidence", which is as close as can be to a true statement of fact, the antithesis of opinion ? That the Legislature did not repudiate

That *Jensen* tried to moderate its stance by joining "incompetence" to "crime or dishonesty" does not lessen the violation of the employee's civil right. Employers simply avoid using the taboo words INCOMPETENCE or INCOMPETENT and imply the very same by using other language and by combining numerous defamatory aspersions (artfully phrased to appear individually innocent, but which an audience will readily perceive in a defamatory sense) instead of a single word. Subsequent courts have made this loophole the proverbial "barn doors" by ruling even the worse criticisms to be "opinions, subjective statements, rather than declarations of incompetence" in complete disregard of the traditional law of defamation which holds that defamation depends not on whether the statement is the opinion or subjective expression of its speaker/author but on whether the statement is likely to be perceived in a defamatory sense by the likely audience or readership, as well as in gross disregard of explicit California statute codifying defamation

> as publication "which has a *tendency to* injure him in his occupation" (Ca.Civ.Code § 45 : libel) or "*tends* directly to injure him in respect to his office, profession, trade or business, either by *imputing* to him general disqualification in those respects which the office or other occupation peculiarly requires, or by *imputing something with reference* to his office, profession, trade, or business that has a *natural tendency* to lessen its profits; or [W]hich, *by natural consequences* causes actual damage" (Ca.Civ.Code § 46: slander) [italics added].

Such statutory language clearly outlaws defamatory implications, even those which avoid the taboo words incompetence or incompetent, but courts ignore them as

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Jensenoutright was probably due to the difficulty of legally defining "opinion", but, contradicting Jensen, it did reaffirm that defamation can arise specifically in the employment context without accusation of criminality or dishonesty and reduced the loss-of-privilege threshold for defamation from malice (which is the standard in other areas of civil life) to lack of credible evidence.

aforementioned. Thus, for all practical purposes, since *Jensen*, an employer can no longer defame an employee short of accusing the employee of crime, dishonesty or using the taboo words incompetence or incompetent.

Petitioner reiterated his objection to civil disability attaching to employment with the California Court of Appeal (Appellant's Opening Brief p. 30 fn. 19, Petition for Rehearing p. 36 2nd ¶) and with the California Supreme Court (Petition for Review p. 27 lines 1-6).

The Reconstruction (13th, 14th, 15th) Amendments give this Court jurisdiction on claims of civil disability imposed by State action, here by the California Courts.

A civil disability attaching to employment is a priori against the fundamental policy of all modern societies, as reflected in the 13th, 14th and 15th Amendments to the United States Constitution, as well in the Universal Declaration of Human Rights (§§ 12, 23). It is offensive to those whom such law would debase, and attempt at rationalizing such offense compounds the indignity.

The Reconstruction (13th, 14th & 15th) Amendments to the United States Constitution express the concept that the society shall not be divided[8] between "citizens" and "less than citizens", a division which has roots in Antiquity and the development of labor-intensive agriculture, leading to indentured labor, serfdom (servitude), and slavery, by means of caste formation based on employment/economic activity or ethnic or birth or gender or (spoils of) war or legal (criminal attainder) status. The formation or maintenance of such division was done through one or more such criteria. Civil disability attaching to employment/economic activity forms and maintains the division even by itself. The

[8] This can be seen in the congressional language "All persons ... shall have the same right ... as is enjoyed by white citizens, ..." of the contemporary civil right law 42 U.S.C. 1981. The language emphasizes "All", i.e. no division, and the white citizens were, at the time, the most favored segment of society *Dred Scott infra*. This intent is therefore broader than racial equality alone.

violation of this fundamental concept cannot be rationalized by some extraneous argument, so long as the division of society persists.

Because division can be created or maintained either through employment/economic status or personal-characteristics status, its eradication necessitated two amendments (actually three, the 15th being the assertion of voting rights), one addressing employment/economic status, and the other personal-characteristics status. Thus the purpose of "equal protection of the law" is eradication of division whether through employment/economic activity or otherwise.

The 13th Amendment tried to remove the division through emancipation, but was circumvented by disguising a return to involuntary servitude through criminalization of unemployment of former slaves who would not accept the nominal wages former slave owners collusively offered them ("vagrant laws") and other legal devices: emancipation was a goal more than a fact.

To remove this division, all legal devices which, whether by intent or effect, promote a division of society were and are banned through the 14th Amendment. As significant as its magnitude, if not more so, is the direction of a step toward division of the society. Equal protection of the law precludes a move in that direction, and direction by itself can invalidate a law.

Involuntary servitude, in its broadest sense, is a division of society between "citizens" and "less than citizens" from, through or for the rendering of personal services, to the advantage or at the behest of "citizens", and to the corresponding disadvantage or despite the objections of "less than citizens". As a result, the latter are "civilly disabled". Now, the reach of the 13th Amendment is absolute, affecting both States and private parties, and preventing a return to or even a single step in the direction of a state of affairs resembling in any way or to any degree that existing prior to the 13th Amendment. Since employment or the rendering of personal services is at the heart of the state of affairs existing prior to the 13th

Amendment, no legal inequality, whether deliberate or consequential, of any kind attaching or pertaining to employment or the rendering of personal services may be imposed by a State or claimed by a private party. In other words, all civil disabilities attaching to or arising from employment or the rendering of personal services are per se unconstitutional, whether arising by law or by contract or otherwise.

Two practical situations are now presented to illustrate the application of this principle.

In *Dred Scott v. Sanford* 60 U.S. 393 (1856), Justice Curtis, dissenting, observed that neither natural law nor precedent in unwritten common law supported the notion that a human being may be inherently inferior to another, and that slavery was wholly a creation of "municipal law". He further observed that in some slave-holding States a slave-owner could, with impunity, cause the demise of one's slave, while in some other State a slave-owner could, with impunity, hit one's slave but without further endangering him or her. And this possibility was a pure creation of the "municipal law" of the time, place and society. Parallel this to the instant case. The California Courts have ruled that an employer can without liability defame an employee, so long as the employer (master) does not accuse the employee (servant) of crime, dishonesty (or incompetence). Incompetence is such a grey area (for some courts) that it has become the loophole of the proverbial open barn doors, so for all practical purposes, an employer can defame an employee so long as the employer does not accuse the employee of crime or dishonesty and carefully avoids the taboo words INCOMPETENCE and INCOMPETENT while implying the same in myriad ways such as cumulative defamatory aspersions. One may want to think that the two cases are different, but a further analysis shows that they are indeed parallel. Why did State law allow a slave to be hit by the owner ? Slaves received food, clothing but no wages, so harsh physical "discipline" was the way a dissatisfied owner might use to "motivate" a slave. In modern times, employers need not physically discipline their employees, they might

use performance evaluations instead. But a derogatorily false, and therefore defamatory, performance evaluation (e.g. to forestall a complaint of violation of anti-discrimination laws) can damage an employee's career and offend dignity (see Universal Declar. of H. R. §12) no less than a slave was hurt in her or his person and dignity. The Reconstruction Amendments did more than dissolve the bonds of master and slave, and recognize the citizenship of Dred Scott and his family. They ensured that no laborer can be hit by a dissatisfied employer with impunity, and in modern times, that no employee can be defamed without liability by a dissatisfied or pretext-seeking employer. To countenance anything less would signal the return to the slippery road of open season on employees leading to division of the society.

So far we have discussed violation of the Reconstruction Amendments directly from their historical origin. It may now be appropriate to put this discussion in perspective with the jurisprudence of due process and equal protection of the law. In this jurisprudence, it has become customary to treat certain violations of equal protection such as racial or sex discrimination with strict scrutiny of demonstration of a compelling governmental interest, while others are treated leniently under a rational basis of conceivably rational legitimate governmental purpose. Similarly, due process applies to procedural arbitrariness or unreasonableness or inadmissible bias, or to disparagement of substantive, fundamental rights necessitating the protection of process of law.

With regard to equal protection of the law, the various levels of scrutiny may be understood as follows. Earlier we referred to direction of a step toward formation or maintenance of division of the society and stated that direction by itself is sufficient to invalidate a law. Thus, strict scrutiny is reserved for discrimination by race, ethnicity, birth and the like because these may be used as substitute criteria for employment/economic status in the division, especially maintenance thereof. On the other hand, classification for a governmental purpose which does not

result in a move toward formation or maintenance of a division resembling or approaching previous divisions in human history may be seen as a move in a neutral direction, with the lenient rational basis analysis used to ensure that the neutral direction is not a disguise for a move in the wrong direction. In the instant case, however, the move is clearly in the wrong direction, so the move is per se unconstitutional, i.e. no compelling government interest, let alone some rational petty governmental scheme, could justify (the division of society and therefore) the move.

With regard to due process, the right to a reputation has been federally considered as lesser than other fundamental rights when the damage of defamation affects reputation only, but is fundamental when the damage extends beyond to include economic damage or worse. In the employment context, defamation of employees is likely to affect their livelihood and career, so the right affected is fundamental and due process of law applies to State action. This is in accord with the Universal Declaration of Human Rights which recognizes a right to a reputation (§ 12) and the right to adequate working conditions (§ 23). See also Ca.Civ.Code § 43.

Accordingly *Jensen*, *Banks* and similar precedents should be overruled and nullified because they create civil disability attaching to employment, namely that an employer can for all practical purposes (the "incompetence" qualification or any similar qualification notwithstanding) effectively defame an employee without liability: large segments of the society earn a living by rendering personal services, they should not be required to give up their civil rights in order to do so, for that is the road back to involuntary servitude where employers can control employees such as forcing them into pretextual resignations under threat of defamatory evaluations in order to forestall complaints of violation of antidiscrimination laws (or other laws). Similarly the judgement of the California Courts in the instant case dismissing the cause of action for defamation should be reversed for the same reason.

Question 3. Due process and equal protection of law I

This Court's jurisdiction arises as follows. Petitioner claimed fraud at the time of hire, namely ostensibly non-temporary hire (to prop up appearance of compliance with antidiscrimnation laws and notwithstanding his in-interview offer to work on a temporary basis for a preliminary period), but with real intent for employment to be temporary only, causing damage to his employment prospects with prospective employers who wonder at the brevity of the employment. 3D demurred arguing the claim was really one for wrongful termination, with the latter being disallowed by its claim of employment terminable at will. He insisted the wrongdoing was at hire, and therefore fraud, and that there is damage separate and beyond termination of employment. The Superior Court introduced its own element to sustain demurrer to fraud w/o leave to amend, by requiring allegation of promise of permanent employment, an impossibility when employment is terminable at will. The issue was not argued further at the Superior Court level because immediately before the hearing on demurrer 3D through Counsel asked him to negotiate a settlement (see 65K). When the issue was raised again at the appellate level, 3D complained that new facts were being brought up; he then filed a January 26, 2000 Motion with the California Court of Appeal for equitable estoppel of 3D due to 3D's proposal to negotiate a settlement, or in the alternative two requests for judicial notice, one of which was judicial notice of previous California court of appeal rulings on the subject of temporary, non-temporary and terminability at will:

> ... Longevity of service ... alone do[es] not change the status of an at-will employee to one dischargeable only for cause *Davis v. Consolidated Freightways* 29 Cal.App.4th 354, 445 (1994). ... Lengthy service ... does not ... create an implied agreement for permanent employment. *Tollefson v. Roman Catholic Bishop of San Diego* 219 Cal.App.3d 843, 856 (1990) (citing *Miller v. Pepsi-Cola Bottling* 210 Cal.App.3d 1554, 1558-9 (1989))

The California Court of Appeal denied said motion on

March 21, 2000. Jurisdiction arises because the ruling of the California Court of Appeal elaborated on the Superior Court ruling, and said rulings are in clear contradiction of the previous California court of appeal rulings on the subject, making one set irrational or unreasonable or arbitrary. A careful analysis shows that the previous court of appeal rulings to be better founded than those in the instant case, so the rulings in the instant case are the ones to be irrational, unreasonable or "tailored for the purpose", a violation of due process of law under the 14th Amendment. This is so because the fraud is not just simple tort but because the fraud was motivated by a violation of antidiscrimination laws, and therefore a violation thereof under the doctrine of continuing violation *Accardi v. Superior Court* 17 Cal.App.4th 341 (1993). Antidiscrimination laws confer on natural persons a fundamental, civil right Ca.Gov.Code § 12921, and fundamental civil rights are entitled to due process of law, which lies within the jurisdiction of this Court.

The rationality/irrationality aspect arises as follows. Petitioner maintained or argued that even a claim of employment terminable at will would encompass both non-temporary and temporary employment. The fraud involved the distinction between non-temporary and temporary employments, and his reliance on non-temporary employment was and is therefore reasonable. He pointed to jurisprudence, i.e. previous California court of appeal cases which make the point that employment terminable at will encompasses both temporary and non-temporary employments so that a "terminable at will" employee does not become permanent but remains "terminable at will" when the employment changes from temporary to non-temporary even when the employment lasts for one or more decades. Such argument by these courts clearly contradicts the rulings in the instant case (Superior Court's requirement of promise of permanent employment, Court of Appeal's elaboration that because the employment was terminable at will he had no expectation of employment for any period of time -- citing *Camp v. Jeffer, Mangels, Butler & Marmaro* 35

Cal.App.4th 620, 639-640 (1995); in the same breath *Camp* contradicts the instant rulings as well "... Nor was the Camps' at-will status altered by the fact that they switched from temporary to permanent secretarial positions ..."[9] --, and thus no expectation of either temporary or non-temporary employment). In response to the Court of Appeal's ruling, he used a quasi-mathematical analysis, namely mutual exclusivity (of statements) in logic (Petition for review by California Supreme Court - Issue No.1 p 1-2) to show that while terminability at any time or for any reason can be mathematically shown to be mutually exclusive with fixed-term employment or employment terminable for specified or good cause only or permanent employment, it was not mutually exclusive with either temporary terminable at will employment or non-temporary terminable at will employment. This quasi-mathematical analysis of mutual exclusivity (as indication of unjustified reliance) shows that the "***at-will includes temporary and non-temporary***" ruling of the four *Davis, Tollefson, Miller* and *Camp* courts is more plausible than those in the instant case, indicating that it is the rulings in the instant case which are unreasonable or irrational. Furthermore, if the Court of Appeal's argument is drawn to its logical conclusion, an employer could refuse to pay any wages due since the employee has no expectation of employment for any period of time and therefore no entitlement to any wages. This kind of argument is not even supported by the California codification of terminability at will: Ca.Lab. Code § 2922

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[9] On p 14 of the Petition for review by the California Supreme Court petitioner stated "it would be a miscarriage of justice to claim one thing here and then deny it there merely to deny a plaintiff's claim". As petitioner finalizes this petition, the California Supreme Court, on October 5, 2000 has just endorsed the contradictory statement of the four courts of appeal: "We ... decline to interpret ... as holding that long, successful service, standing alone, can demonstrate an implied-in-fact contract right not to be terminated at will. ... [T]he undoubted length and merit of Guz's career does not bolster his claim that his at-will status had been altered by an implied contract." Guz v. Bechtel National, Inc. _Cal.4th _ (S062201)

"An employment having no specified term may be terminated at the will of either party *upon notice to the other* ...". The *notice* requirement protects the employee's title to wages earned, an employer cannot claim *retroactivity* of terminability at will *before* notice is given, and the Court of Appeal's ruling necessitates such retroactivity, this is another indication of the unreasonableness or irrationality of the ruling (by contrast, the ruling of the four courts depends on activation upon or after notice and has no such problem). Thus, a claim of terminability at will cannot remove liabilities incurred prior to the giving of notice. Moreover, petitioner argued in Appellant's Opening Brief (p 8-11) that terminability at will means that there is no contractual damage from the termination of employment itself or its necessary consequences [which is consistent with the forward-looking requirement of notice] but this does not excuse tortious conduct, before, during or after employment, resulting in damage separate from the necessary consequences of the termination [this is sometimes referred to as tort-contract duality, *Tameny v. Atlantic Richfield Co.* 27 Cal.3d 167 (1980) at pp 174-176 as cited in Appellant's Opening Brief at p 46-47 & fn. 39].

(His in-interview offer to work for 3D on a temporary basis for a preliminary period was not reciprocated by a disclosure of 3D's intent, which would have reduced damage to his career and prospects with prospective employers, leaving 3D liable.)

Thus the dismissal of the cause of action for fraud should be reversed so it may be pursued as a continuing violation of the antidiscrimination laws in employment.

Question 4. Due process and equal protection of law II

A sufficient proof is more complete than prima facie because it addresses all symptoms. It is a violation of due process to label it "speculation" and dismiss it upon demurrer, even when state antidiscrimination laws are concerned. This is so because not giving faith and credit to a plaintiff at this stage falls below minimal standards of process afforded to fundamental rights such as civil rights.

The allegation is that 3D ostensibly hired him, as a non-

temporary employee with the actual intent of treating him as a temporary employee, that 3D did so to prop up its appearance of compliance with antidiscrimination laws in employment and discourage complaints under same laws by other or former employees, that in so doing 3D abused his protected status (race, ethnic origin, age, etc) under same laws, that while so motivated it defrauded (see question 3) and defamed (see questions 1 and 2) him with resulting damage to his livelihood and career prospects with prospective employers who wonder at the brevity of his employment with 3D.

California antidiscrimination laws in employment (F.E.H.A) closely parallel the language of federal law, so both procedure and substance, state and federal, are also parallel. California law is more explicit than federal law with respect to aiding violation: Ca.Gov.Code § 12940(g)

> It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: (g) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.".

Nevertheless federal jurisprudence (case law, if not statute) also rejects incipient violation, e.g. *Auto Workers v. Johnson Controls* 111 S.Ct. 1196 (1991) (incipient violation of the federal Pregnancy Discrimination Act -- exclusion of persons capable of bearing children who are not pregnant yet as compared to persons who are pregnant or have just delivered a child --): an incipient violation or the aiding of violation are closely related and often the same.

The aiding of violation modifies both the substance (what) and method (how) of proof. The victim may no longer be the target of discrimination, instead the victim's protected status may be used (and therefore abused) to aid the violation. Accordingly, at all levels, superior court and appellate levels, petitioner proposed what was to be proved, and that proposal can be briefly summarized as follows (Appellant's Opening Brief pp 22 & 24 "Sufficient proofs

...", Reply Brief p 19 lines 3-6, Petition for Rehearing pp 25-29, Petition for Review Issue No. 6 pp 20-21).

> *What is to be proved is a connection, causal or consequential --without proper business justification--, to a protected status* (here, petitioner's) *or activity* (e.g. complaint leading to retaliation) *or function* (e.g. abuse of status such harassment, "quid pro quo" abuse), *of a conduct* (here, defendant's fraud and defamation, motivated by attempt to aid violation) *which ultimately injures a plaintiff* (i.e. petitioner in his livelihood and career prospects with prospective employers). And proof *thereof* would be *sufficient* to show violation.

This proposal[10] of what is to be proved is a more general statement of the possible combinations of disparate treatment ("causal"), disparate impact ("consequential") and mixed motives ("or", "a conduct") jurisprudence, of the variety of protections (status, activity, function) and it recognizes that the plaintiff may not be the *target* of discrimination but that someone's protected status has been wrongfully used (and thus abused) and that a plaintiff (who need not be the target of discrimination or abuse of protected status) may have been injured as a result of this unlawful attempt to aid violation.

As how to prove the violation, petitioner's proposal (Appellant's Opening Brief pp 24-29, Reply Brief pp 18-22, Petition for Rehearing pp 22-33, Petition for Review Issue No. 6(c) pp 20-25) can be summarized as

> a combination of *elimination* and *diagnosis* methods of *inference* and *verification*: (i) the elimination method has been extensively used by federal courts; in this method, intent is inferred circumstantially by an inferential process of elimination, leaving either arbitrariness or a

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[10] An early form can be found in Heard v. Lockheed Missiles & Space Co. 44 Cal.App.4th 1735 (1996): precise model not critical; need direct or circumstantial evidence permitting inference of *a causal connection to a classification protected by* ... . See also Ewing v. Gill Industries 3 Cal.App.4th 601 (1992) and Price Waterhouse v. Hopkins 109 S.Ct. 1775 (1989).

discriminatory reason[11]; (ii) the diagnosis method is a generalization of the elimination method; it selects a subset of symptoms, which subset may vary according to what symptoms are available, tries to develop a single or a least number of cause(s), motive(s), or intent(s) from the subset, and *verifies* the single cause, motive or intent by reconciling it with the *remaining symptoms*; the choice of subset is not rigid and is adapted to facilitate elimination of causes and reduction to a single cause; if the single cause, motive or intent can explain all of the symptoms, the proof is said to be *sufficient*.

In accordance with the proposed method of proof, petitioner provided the following analysis. There are at least three separate evidences (defendant's president's reservation, interviewer's vagueness about job responsibilities, defendant's conduct immediately after hire and henceforth) of the intent of hiring petitioner temporarily only. There are at least two separate evidences (petitioner's in-interview offer to work on a temporary basis for a preliminary period, which offer defendant did not take up, defendant's parading petitioner to staff as a regular employee) that defendant had an interest in petitioner appearing as a non- temporary employee. Applying the elimination method to the dimensions of time and petitioner's work performance, one can conclude that the reason for the contradiction between non-temporary/temporary hire could not depend on petitioner's subsequent work performance since the intent of temporary hire existed already at the interviews. Applying the elimination method a second time leads to the diagnosis that if it is not petitioner's performance, then the reason at such an early stage was petitioner's protected status such as race, ethnic origin, age, etc. (to prop up defendant's

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[11] McDonnell Douglas Corp. v. Green 93 S.Ct. 1817 (1973), Teamsters v. U.S. 97 S.Ct. 1843, 1866 (1977), "Thus, when all legitimate reasons ... have been **eliminated** ..." Furnco Construction Corp. V. Waters 98 S.Ct. 2943, 2949 (1978), it is error to require direct intent of discrimination U.S.P.S. Bd. Of Gov. v. Aikens 103 S.Ct. 1478 (1983) 1482-1483

appearance of compliance with the antidiscrimination laws). This diagnosis is confirmed by verifying that it agrees with the remaining symptoms such as: evidence that shortly before or around petitioner's hire, a productive and prominent long-time employee, who is Asian like petitioner and of similar job level, had left defendant for career advancement to manager at a business partner of defendant (this evidence agrees threefold, with timing, protected status and resulting advantage), other evidence of substantial concentration of protected status workers among defendant's temporary workers, other evidence of defendant's favoring a Caucasian employee over two or more Asians including petitioner, evidence from the fraud, the cover up and the defamation. Thus, petitioner provided a sufficient proof of violation since the diagnosis was verified with the remaining symptoms, which are ample in number. It is limited only in that defendant has so far not ventured to answer, preferring to demur only. Yet the California courts call it speculation, let alone prima facie evidence. While differences of opinion may persist, such disregard of proof that is sufficient is a gross violation of due process of law to which fundamental rights such as civil rights are entitled, and the judgement of the California Courts dismissing petitioner's cause of action for violation of antidiscrimination laws should be reversed by this Court.

Indeed, the elimination and diagnosis/verification method of proof is as close as one can get to application of the scientific method in a setting where the ability to conduct experiments is restricted ethically or by the passage of time.

CONCLUSION

The judgement of the California Courts should be reversed for the reasons stated herein.

DATED: October 9, 2000

Respectfully submitted by
DINH TON THAT
Petitioner, in propria persona

Tel.: (949) 786-5197

59 Greenfield
Irvine, California 92614-7076

APPENDIX

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION SEVEN

DINH TON THAT, Plaintiff and Appellant, v. 3D SYSTEMS, INC., et al., Defendants and Respondents.	B126207 (Los Angeles County Super. Ct. No. BC179376)

COURT OF APPEAL
SECOND DIST.
FILED
April 25 2000
JOSEPH A LANE CLERK

Deputy Clerk

APPEAL from a judgement of the Superior Court of Los Angeles County, Florence Marie Cooper, Judge, and Soussan G. Bruguera, Judge. Affirmed.

Dinh Ton That, in propria persona, for Plaintiff and Appellant.

Troop, Steuber, Pasich, Reddick & Tobey, Anthony J. Oncidi and Alisa M. Chevalier for Defendant and Respondent 3D Systems, Inc.

[page 2] Dinh Ton That appeals from judgement entered dismissing his first amended complaint following the sustaining, without leave to amend, demurrer of defendant 3D Systems, Inc. He contends for multiple reasons the court

erred in sustaining the demurrer to all causes of action and entering a judgement of dismissal.

STATEMENTS OF FACTS AND PROCEDURAL HISTORY

On October 10, 1997, That filed a complaint against defendants for "fraud, violation of antidiscrimination laws, defamation, breach of covenant of good faith and fair dealing (breach of contract)." In essence, the fraud cause of action alleged that after interviewing plaintiff, defendant offered him employment and based on defendant's representations, plaintiff accepted the offer; while defendant ostensibly hired him as a "non-temporary employee," its real intention was for plaintiffs employment to be only temporary. Plaintiff alleged that defendant dealt with him as if he was a temporary employee, that credit for his work was diverted to another employee and that he was denied the opportunities to exercise his skills in a manner which would enhance his career with defendant. Plaintiff alleged that defendant benefited from plaintiff's services and also from his "status under the anti-discrimination laws in the aforesaid fraudulent scheme of hiring [him] ostensibly as a non-temporary employee while meaning instead for the employment to be temporary ... ." Plaintiff alleged that he was blamed for the shortcomings in the performance or skills of another employee who "in violation of anti-discrimination laws, had been favored by" defendant.

Plaintiff's second cause of action was for "violation of anti-discrimination laws." He claimed defendant violated the "laws against discrimination on the basis of race, ethnic origin, age, etc, in employment" by hiring him ostensibly into the ranks of non-temporary employees and using his "status, such as race, ethnic origin, age, etc., under the anti-discrimination laws to placate such laws and to protect itself from past, present or future complaints under said laws while systematically implementing from the beginning its real intent of employing Plaintiff only temporarily (e.g. by diverting credit for ***[page 3]*** Plaintiff's work to another employee, by denying Plaintiff's opportunities to exercise his

skills and thereby enhance his career at Defendant 3D Systems, Inc.,) and eventually threatening to 'put a stain on your (i.e. Plaintiff's) resume' in order to pressure Plaintiff to resign. ..." Plaintiff additionally alleged the "so-called probation" and defendant's lies about his performance served the additional purpose of protecting defendant from a potential complaint by plaintiff under the anti-discrimination laws and constitutes "pre-emptive retaliation."

Plaintiff's third cause of action was for "Defamation by self-publication." Plaintiff alleged that defendant's lies which were used to put him on probation and to justify termination of employment were made with the knowledge that they were false and with the knowledge that questions about the reasons for leaving defendant's employ would be asked of plaintiff by future prospective employers or recruiters. A recruiter interviewing plaintiff declined to continue the interview when plaintiff would not repeat the lies of defendant concerning plaintiff's performance.

The fourth cause of action was for "breach of covenant of good faith and fair dealing, breach of contract." Plaintiff alleged that defendant's treatment as described previously constituted a breach of the covenant of good faith and fair dealing in the employment agreement of August 1995. Defendant exercised bad faith "in the form of lies" about plaintiff's performance: Plaintiff alleged that he revealed to defendant "the inventions he had discovered, some of which were disclosed during the probation period" but defendant continued to lie about plaintiff's performance but was still eager to have plaintiff assign his inventions to defendant.

On January 16, 1998, defendant filed a demurrer to the complaint. The demurrers to the first and fourth causes of action were sustained without leave to amend. The demurrers to the second and third causes of action were sustained with leave to amend.

Thereafter, plaintiff filed a first amended complaint asserting the two remaining causes of action for violation of anti-discrimination laws and defamation by self-publication. Defendant again demurred on the same grounds previously

asserted. The *[page 4]* trial court sustained the second demurrer to these two remaining causes of action without leave to amend and entered judgment of dismissal. Plaintiff's motions for reconsideration and for clarification were denied

DISCUSSION

" 'A demurrer tests the legal sufficiency of the complaint ... .' [Citations.] On appeal from a dismissal after an order sustaining a demurrer, we review the order de novo, exercising our independent judgment about whether the complaint states a cause of action as a matter of law. [Citations.] We give the complaint a reasonable interpretation, reading it as a whole and viewing its parts in context. [Citations.] We deem to be true all material facts properly pled. [Citation.] We must also accept as true those facts that may be implied or inferred from those expressly alleged. [Citation.] If no liability exists as a matter of law, we must affirm that part of the judgment sustaining the demurrer. [Citation.] [¶] While the decision to sustain or overrule a demurrer is a legal ruling subject to de novo review on appeal, the granting of leave to amend involves an exercise of the trial court's discretion. [Citations.] When the trial court sustains a demurrer without leave to amend, we must also consider whether the complaint might state a cause of action if a defect could reasonably be cured by amendment. If the defect can be cured, then the judgment of dismissal must be reversed to allow the plaintiff an opportunity to do so. The plaintiff bears the burden of demonstrating a reasonable possibility to cure any defect by amendment. [Citations.] A trial court abuses its discretion if it sustains a demurrer without leave to amend when the plaintiff shows a reasonable possibility to cure any defect by amendment. [Citations.] If the plaintiff cannot show an abuse of discretion, the trial court's order sustaining the demurrer without leave to amend must be affirmed. [Citation.]" (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1500-1501, fn. omitted.)

The essence of plaintiff's cause of action for fraud is his claim that defendant carried out a fraudulent scheme to hire

him as a non-temporary employee but to treat him *[page 5]* as a temporary employee and that this scheme was motivated by defendant's desire to create the impression that it was complying with anti-discrimination laws.

The essential allegations of an action for fraud are a misrepresentation, knowledge of its falsity, intent to defraud, justifiable reliance, and resulting damage. (*Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 109.) Plaintiff is unable to plead a misrepresentation, that an actual promise of permanent employment was made which induced him to accept the job. The terms of the employment agreement, of which the court properly took judicial notice (see *Blank v. Kirwan* (1985) 39 Cal.3d 31 I, 318) expressly state that plaintiff agreed that his "employment is at will and either [he or defendant] can terminate the relationship at any time for any reason." To prevail on a claim for misrepresentation, plaintiff would have to establish he justifiably relied on the alleged statements. Since he was an at-will employee he had no reasonable expectation that he would be employed by defendant for any particular length of time. (See *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 639-640.)

Additionally, to the extent that this cause of action is based on defendant's alleged misrepresentation that plaintiff would have job security, it is part and parcel of a wrongful discharge claim and cannot serve as a predicate for tort damages. (*Hunter v. Up-right, Inc.* (1993) 6 Cal.4th 1174, 1184.)

In essence, plaintiff's cause of action for a "violation of anti-discrimination laws" in his original complaint and first amended complaint was speculation that defendant hired him ostensibly as a non-temporary employee and used his minority status "under the anti-discrimination laws" to give the appearance of compliance with the laws and to protect itself from past, present or future complaints.

"Under both state and federal antidiscrimination legislation, it is unlawful for an employer to discharge a person on the basis of race, or otherwise 'discriminate

against the person in compensation or in terms, conditions or privileges of employment.' While *[page 6]* the California act and title VII[12] differ in some particulars, their objectives are identical, and California courts have relied upon federal law to interpret analogous provisions of the state statute. [Citations:]" (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1316-1317, fn. omitted.)

To prevail under a theory that he was treated less fairly than others because of his race, plaintiff must show that his employer harbored a discriminatory intent. "Where discharge from employment is the challenged action, the complainant must make an initial showing that he was discharged from a position for which he was qualified 'under circumstances which give rise to an inference of unlawful discrimination.' [Citation.] The circumstances generally fall into two categories: either he was replaced by a nonminority member no more qualified than he [citations], or he was fired when nonminority co-workers similarly situated were not fired. [Citations.] The prima facie case for discriminatory discharge can therefore be stated thusly: (1) complainant belongs to a protected class; (2) his job performance was satisfactory; (3) he was discharged; and (4) others not in the protected class were retained in similar jobs, and/or his job was filled by an individual of comparable qualifications not in the protected class." (*Mixon v. Fair Employment and Housing Commission, supra*, 192 Cal.App.3d at p. 1318.) This test has been adapted to challenge a variety of adverse employment decisions. (*Ibid.*)

At the hearing on the demurrer, plaintiff summarized this cause of action by stating plaintiff was hired "as an at-will regular employee, when defendant's real intent was for defendant to employ plaintiff temporarily only; that this was done in an abuse of plaintiff's status to prop up defendant's appearance of compliance with the antidiscrimination laws; to wit, the presentation of plaintiff to an all-hands staff

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[12] California Fair Employment and Housing Act, Government Code section 12900 et seq, and title VII of the Federal Civil Rights Act, 42 United States Code section 2000e et seq.

meeting as a newly hired regular employee as opposed to a contractor; and that the effect of this would be to discourage [other complaints based on racial discrimination]."

[page 7] Plaintiff has failed to allege any act of discriminatory conduct but has merely concluded without factual support that defendant's scheme and plaintiff's resulting termination violated laws against racial discrimination. These allegations failed to meet the burden of establishing a prima facie case of discrimination against defendant. (See *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735.)

Appellant alleges in his cause of action for defamation that defendant's lies about his performance were "made in bad faith for the purpose of covering up the aforementioned abuse of plaintiff's status under the anti-discrimination laws, and that defendant knew that questions about the reasons for plaintiff leaving defendant's employ would be asked of plaintiff by future prospective employers or recruiters (to wit, Richard Leyden's threat to 'put a stain on your --plaintiff's--resume). ... Defendant therefore defamed plaintiff under the doctrine of defamation by self-publication." It was further alleged that Leyden told plaintiff that although he "had exercised good leadership earlier,

[he] had not exercised leadership as expected lately. [Leyden] also told plaintiff that if plaintiff did not resign his employment with defendant in the next few days, defendant would 'put a stain on [his] resume.' " Plaintiff alleged the defamation continued through the "'Performance Appraisal and Development Record'" and that he was marked "below standard" in many of the categories of the appraisal.

"In defamation actions, it is entirely appropriate for the court to determine in the first instance 'whether the publication could reasonably have been understood to have a libelous meaning.' [Citation.] [¶] 'Libel is a false and unprivileged publication by writing ... which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him [or her] to be shunned or avoided, or which has a tendency to injure him [or her] in his [or her] occupation.'

[Citation.] A publication 'must contain a false statement of fact' to give rise to liability for defamation. [Citation.] A statement of opinion 'cannot be false and is outside the meaning of libel.' [Citation.] '[T]he dispositive question ... is "whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion."' [Citation.] The court examines the communication in light of the context in which it was published. The communication's meaning must be ***[page 8]*** considered in reference to relevant factors, such as the occasion of the utterance, the persons addressed, the purpose to be served, and 'all of the circumstances attending the publication.' [Citation.]" (*Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 969-970.)

In *Jensen* the court concluded that comments in an employer's evaluation of an employee could not reasonably be interpreted as false statements. The court noted it was a 14-page evaluation of the employee's performance by a manager in the course of his designated duties as managers; it documented one manager's assessment of the employee's work habits, interpersonal skills and level of effort, and outlined the employer's expectations regarding improvement. The court observed that the word "evaluation" denoted opinion and not fact. The court also analyzed the contents of the evaluation and concluded none suggested the employee "lacked honesty, integrity or the inherent competence, qualification, capability or fitness to do his job, or that he had reprehensible personal characteristics. The categories of comments were ratings by which the manager expressed a value judgment such as "'good,' 'acceptable' or 'unacceptable,' about [the employee's] comparative level of skills, performance or attitude; directions in which [the manager] advised [the employee] that he was expected to develop or improve in various areas; and general remarks about [the employee's] attitude toward his job responsibilities and his coworkers."

In *Banks v. Dominican College* (1995) 35 Cal.App.4th 1545, the court observed, there could be no liability fbr defamation, "because any statements of opinion as to

appellant's unsuitability for a teaching position were not actionable as either slander or libel. The statements before us do not impute crimes or dishonesty to [appellant]. Rather, they contain opinions that [appellant is] not performing [her] duties competently .... The assertions ... relate directly to [her] fitness .... As such, they constitute protected statements of opinion which are not properly die subject of a libel action.' [Citations.]" (*Id.* at p. 1554.)

Similarly, the statements here are expressions of subjective judgment regarding plaintiff's job performance and are not actionable.

[page 9] Additionally, pursuant to Civil Code section 47, subdivision (c), an employer has a qualified privilege of communication to a listener with a common interest. "A privileged publication or broadcast is, one made: ... (c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, the prospective employer. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law."

"To defeat this conditional privilege, a plaintiff must specifically allege malice. [Citation.] A general allegation of malice will not suffice; plaintiff must allege detailed facts showing defendant's ill will towards him. [Citation.]" (*Robomatic, Inc. v. Vetco Offshore* (1990) 225 Cal.App.3d 270, 276.) Here plaintiff failed to plead a single fact from which bad faith or malice on the part of defendant could be

inferred and the court properly sustained the demurrer.

Plaintiff attempted to allege a cause of action for breach of the implied covenant of good faith and fair dealing. "[A] contract cause of action for breach of the implied covenant may be stated if the plaintiff can show he was denied the benefits of the parties' agreement. [Citation.] The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purposes.' [Citation.]" (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 480-481.) Here plaintiff did not present evidence of any contract term or established company policy which assured him of continued employment or which was violated by his termination. Because plaintiff ***[page 10]*** cannot show that a contractual covenant or promise was violated, sustaining the demurrer to his cause of action for breach of the implied covenant of good faith and fair dealing was proper.

Plaintiff has failed to demonstrate the defects in his complaint could be cured by further amendment and thus the trial court properly sustained the demurrer to all causes of action without leave to amend. (See *Lazar v. Hertz Corp., supra*, 69 Cal.App.4th at p. 1501.)

DISPOSITION

The judgment is affirmed. Respondent to receive costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LILLIE, P.J.

We concur:

WOODS, J.

NEAL, J.

42 B

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 7

March 21, 2000

Dinh Ton That
vs
3D Systems, Inc.

B126207
Los Angeles County No. BC179376

THE COURT:

Appellant's Motion filed 1-26-2000 is denied.

cc: All Counsel
File

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 7

May 12, 2000

Dinh Ton That
vs
3D Systems, Inc.

B126207
Los Angeles County No. BC179376

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

44 D

IN THE SUPREME COURT OF CALIFORNIA

En Banc

S088894
([California] Court of Appeal, Second Appellate District, Division Seven - No B126207)

DINH TON THAT, Appellant,
v.
3D SYSTEMS, INC. et al., Respondents,

Petition for review DENIED.

GEORGE
Chief Justice

[CA] SUPREME COURT
FILED
July 12 2000
Frederick K. Ohlrich Clerk

Deputy

[Notice from Office of the Clerk, Supreme Court of California, 350 McAllister Street, San Francisco, CA 94102]

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date: 09/15/98 Dept. 33

Honorable SOUSSAN BRUGUERA, Judge
R. VILLARREAL, Deputy Clerk
C. KIMBELL, CA Deputy Sheriff/C. GARROD Reporter

8:30 am BC179376
DINH TON THAT Plaintiff's Counsel
Dinh Ton That (X)

VS

3D SYSTEMS INC Defendant's Counsel
Alisa M. Chevalier (X)

NATURE OF PROCEEDINGS
(1) PLAINTIFF'S MOTION FOR RECONSIDERATION OF PROPOSED ORDER AND FOR LEAVE TO AMEND FIRST AMENDED COMPLAINT;
(2) PLAINTIFF'S MOTION TO REQUEST CLARIFICATION OF PROPOSED RULING;

The Motions are called for hearing, After argument the Motion for Reconsideration is denied.

The Motion for Clarification is also denied.

Counsel for defendant, Ms. Chevalier, is to give notice and submit a proposed order for the Court's signature.

Pursuant to Court order the Judgement filed and signed on July 27, 1998 is amended to add the costs of $257.90 pursuant to cost bill filed on August 10, 1998.

A copy of this minute order is mailed to defense counsel and plaintiff at the following addresses:
Alisa M. Chevalier
20209 Century Park East, Suite 2400
Los Angeles, CA 90067-3086

Dinh Ton That
59 Greenfield
Irvine, CA 92614-7076

MINUTES ENTERED
09/15/98
COUNTY CLERK

REPORTER'S TRANSCRIPT OF HEARING OF SEPTEMBER 15, 1998

BEFORE THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES DEPARTMENT 33

Case No.: BC179376 Case Name: That vs. 3D Systems
Los Angeles, California; Tuesday, September 15, 1998
Hon. SOUSSAN G. BRUGUERA, Judge
Department No. 33
Reporter: CARMEN J. GARROD, CSR No. 4009
Time: 9:09 a.m. (Appearances as heretofore noted.)[1]

The Court: That, T-H-A-T, vs. 3d Systems.
Mr. That: Dinh Ton That for himself.
The Court: Can you spell it for the record.
Mr. That: D-I-N-H and then T-O-N and then T-H-A-T.
The Court: And ...
Ms. Chevalier: For Defendant 3D Systems, Inc., Alisa Chevalier.
The Court: You can have a seat. Defendant, you were served with the paperwork, right ?
Ms. Chevalier: Yes, I was.
The Court: Would you put on the record your position.
Ms. Chevalier: Yes, Your Honor. Based on a 1995 Court of Appeal case, Nave N-A-V-E, versus Taggart, T-A-G-G-A-R-T, and that's at 34 Cal.App.4th, 1173, I did not file an opposition to Mr. That's motion for reconsideration because that case stands for the proposition that an entry of judgement is an implied denial of any impending motions, and also stands for the position that once a judgement is entered the trial court cannot correct judicial error except in accordance with statutory proceedings. And a motion for reconsideration is not such a motion.

In an effort to save my client the costs of preparing an

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[1] APPEARANCES for Plaintiff-Appellant: IN PROPRIA PERSONA, ... for Defendants-Respondents: Troop Meisinger Steuber & Pasich, LLP, by ALISA M. CHEVALIER, Attorney at law

opposition when I felt that none was warranted, I chose not to. And in addition, because we do intend to file a motion for attorney's fees, in consideration of Mr. That I thought it would be in everybody's best interests for us not to file such an opposition.

The Court: Okay. And you stated your legal position why this motion should be denied right now, right, everything you wanted to say ? What I need is your legal position, because there might be some cases out there. But if it's not in writing or in oral -- you know, the client is not always --

Ms. Chevalier: That was my position, my legal position, as to why I didn't file an opposition for a motion for legal consideration and also why I think it should be denied, in addition to dealing with the merits of the motion.

The Court: That's what I mean.

Ms. Chevalier: The standard of a motion for reconsideration is that it has to be based on additional or new facts or new law, and I don't believe that that standard was met in Mr. That's moving papers. And for all the reasons that we stated in our moving papers in support of our demurrer, in addition to the reply papers, I believe that the Court's ruling sustaining the demurrer without leave to amend was correct.

The Court: So Mr. That, the counsel for the defendant has now stated the legal state of the law as I believe it to be, so I need you to tell me what your response to that is.

Mr. That: In my memorandum in support of this motion ?

The Court: Right.

Mr. That: I mentioned --

The Court: I read all the paperwork, please be assured of that.

Mr. That: There is a case where a motion for adding a new cause of action was entertained after a demurrer and after entry of judgement. So there is case law supporting my request. And it's stated in the second section of my memorandum, so there is at least one case, Greninger vs. Fischer, 1947, 81 Cal. App. --

The Court: 19 what ?

Mr. That: It's Greninger vs. Fischer, 1947, the year 1947, 81 Cal. App. 2nd, 549 on page 581.

The Court: And your position about that case ?
Ms. Chevalier: Is it's no longer good law in light of the more recent decisions.
The Court: So being that that is the state of the law, as I see it, I must deny your motion for reconsideration and ask counsel for the defendant to please give notice and also give me, please, a proposed order and that way we'll preserve the record. Thank you for being here. That's the order.
Ms. Chevalier: May I address one other issue ?
The Court: Sure.
Ms. Chevalier: We filed, on August 10th, 1998, our memorandum of costs, and Plaintiff did not file a motion to tax costs. Would your Honor like for me to submit an amended judgement with the costs, the exact costs stated ?
The Court: No, I don't really know how that works. I'll get off the bench.
The Clerk: I'll tell counsel, your Honor.
Ms. Chevalier: Thank you, your Honor.
The Court: Thank you. Will you have that order, like, in the next week so I can do it before I go ?
Ms. Chevalier: Yes, your honor.
[The proceedings were concluded.][2]

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[2] Reporter's Certificate
. State of California, County of Los Angeles /ss.
I, CARMEN J. GARROD, CSR #4009, Official Court Reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the foregoing pages ..., comprise a full, true and correct transcription of the proceedings held in the above-entitled matter on ... September 15, 1998. Dated this 4thday of January 1999. s/ Carmen J. Garrod CSR No. 4009, Official Court Reporter.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

DINH TON THAT,

Plaintiff

v.

3D SYSTEMS, INC., a California Corporation, and DOES 1 through 50 inclusive,

Defendants

Case No. B126207

JUDGEMENT DISMISSING ACTION ON DEMURRER

ORIGINAL FILED

JUL 27 1998

LOS ANGELES SUPERIOR COURT

The Demurrer of Defendant 3D SYSTEMS, INC. ("Defendant") to the Complaint of Plaintiff DINH TON THAT ("Plaintiff") came on regularly for hearing before this Court on February 6, 1998, the Honorable Florence-Marie Cooper presiding. Plaintiff appeared in pro per. Defendant was represented by Alisa M. Chevalier, Esq. of Troop Meisinger Steuber & Pasich, LLP.

After full consideration of the evidence, the authority submitted by counsel, as well as oral argument by the parties, the Court ruled as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Demurrer to Plaintiffs Complaint is SUSTAINED WITHOUT LEAVE TO AMEND as to Plaintiff's causes of action for "fraud" and "bad faith" and SUSTAINED WITH LEAVE TO AMEND as to Plaintiff's causes of action for "discrimination" and "defamation." Plaintiff's causes of action for "fraud" and "bad faith" shall be, and hereby are, dismissed without leave to amend. Plaintiff's causes of action for "discrimination" and

"defamation" shall be, and hereby are, dismissed with leave to amend.

The Demurrer of Defendant to the First Amended Complaint of Plaintiff came on regularly for hearing before this Court on June 9, 1998, the Honorable Soussan G. Bruguera presiding. Plaintiff appeared in pro per. Defendant was represented by Alisa M. Chevalier, Esq. of Troop, Meisinger, Steuber & Pasich, LLP.

After full consideration of the evidence, the authority submitted by counsel, as well as oral argument by the parties, the Court ruled as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Demurrer to Plaintiff's First Amended Complaint is SUSTAINED WITHOUT LEAVE TO AMEND. Plaintiff's causes of action for "violation of anti-discrimination laws" and "defamation" shall be, and hereby are, dismissed without leave to amend.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgement shall be and hereby is, entered in favor of Defendant, and Defendant shall be awarded its costs of suit herein *pursuant to cost bill.* (*Annot. S.B.*) *$257.90 R.N. 9/15/98* (*Annot. R.N. Deputy Clerk*)

DATED: July 27, 1998 s/ Soussan G. Bruguera
Honorable Soussan G. Bruguera,
Judge, Los Angeles Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

DINH TON THAT,

Plaintiff

v.

3D SYSTEMS, INC., a California Corporation, and DOES 1 through 50 inclusive,

Defendants

Case No. B126207

ORDER SUSTAINING DEFENDANT 3D SYSTEMS, INC.'S DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND

DEPT. 33
FILED
LOS ANGELES
SUPERIOR COURT
July 02 1998
JOSEPH A LANE CLERK
by _____(illegible)_____

The demurrer of Defendant 3D SYSTEMS, INC. ("Defendant") to the First Amended Complaint of Plaintiff DINH TON THAT ("Plaintiff") came on regularly for hearing before this Court on June 9, 1998, the Honorable Soussan G. Bruguera presiding. Plaintiff appeared *in pro per.* Defendant was represented by Alisa M. Chevalier, Esq. Of Troop Meisinger Steuber & Pasich, LLP.

After full consideration of the evidence, the authority submitted by counsel, as well as oral argument by the parties, the Court rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Demurrer to Plaintiff's First Amended Complaint is SUSTAINED WITHOUT LEAVE TO AMEND. ***[page 2]*** Plaintiff's First and Second Causes of Action for "violation of anti-discrimination laws and

"defamation" fail to state claims as a matter of law. (Cal. Code Civ. Proc. § 430.10(e)). Therefore, Defendant is entitled to judgment in its favor on Plaintiff's First Amended Complaint.

Plaintiffs First and Second Causes of Action shall be, and hereby are, dismissed without leave to amend for the reasons set forth below:

A. First Cause of Action for "Violation of Anti-Discrimination Laws":

1. Defendant's Demurrer to Plaintiff's First Cause of Action is sustained without leave to amend as Plaintiff has failed to specify allegations of discriminatory conduct or statements directed to him or to identify a racially hostile environment.

2. In order to state a prima facie case of discrimination, a plaintiff must allege: (i) that he belongs to a protected class; (2) that his performance was satisfactory; (3) that he was discharged; and (4) that others not in the protected class were retained in similar positions, or, that his position was filled by one with similar qualifications and not in the protected class. *Mixon v. Fair Employment and Housing Commission*, 192 Cal. App. 3d 1306, 1318 (1987). A prima facie case of discrimination is established only if the plaintiff alleges "actions taken by [the defendant] from which [to] infer discriminatory animus .. ." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579-80 (1978); see also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981).[1]

3. The facts as alleged by Plaintiff, even if taken as true, do not establish a prima facie case of discrimination. Plaintiff only speculates and concludes that he was hired by Defendant merely to fulfill a racial quota. There are no allegations of any discriminatory conduct or statements

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[1] The objectives of the FEHA and Title VII of the federal Civil Rights Act (42 U.S.C. § 2000e et seq.) are identical, and California courts have relied upon federal law to interpret analogous provisions of the state statute. *Flait v. North American Watch Corp*, 3 Cal. App. 4th 467, 475-76 (1992).

directed at Plaintiff.

[page 3] 4. In addition, Plaintiff has failed to allege any facts connecting his probation and resulting termination to allegedly discriminatory conduct in violation of a statute or law. *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1409 (9th Cir. 1987); see also *Lin v. Circuit City*, 68 F.E.P. (BNA) 571, 575 (C.D. Cal. 1995) (employee was unable to make out a prima facie case of discrimination because his employer had presented evidence that plaintiff "was terminated as a result of his failure to perform his job in a satisfactory manner," and, thus, "[plaintiff cannot make a prima facie discharge discrimination case.").

B. Second Cause of Action for "Defamation":

1. Defendant's Demurrer to Plaintiff s Second Cause of Action is sustained without leave to amend as the statements alleged by Plaintiff in the performance appraisals were protected statements of opinion.

2. "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." Restatement (Second) of Torts § 566 (1977).

3. An employer's statements of opinion regarding an employee's performance may not form the basis of a claim for defamation. Jensen v. Hewlett-Packard Co., 14 Cal. App. 4th 958 (1992) (court affirmed a nonsuit by an employee who charged that his supervisor defamed him with such negative comments as "[not] pulling his weight," "weak project management," "questionable judgment," and "negative feedback.").

4. The Jensen Court held that the fact/opinion determination is a question of law for the court and stated:

> A publication 'must contain a false statement of fact' to give rise to liability for defamation. A statement of opinion 'cannot be false and is outside the meaning of libel. The dispositive question ... is whether a reasonable fact finder could conclude that the published statements imply a probably false factual assertion.'

Jensen at 970 (citations omitted). See also *Morningstar, Inc.*

v. Superior Court, 23 Cal. App. 4th 676 (1994) (writ of mandate to compel dismissal on demurrer to a defamation action because ***[page 4]*** of plaintiff's failure to plead any provably false factual assertions); *Gregory v. McDonnell Douglas Corp.* 17 Cal. 3d 596 (1976) (plaintiff's failure to plead provably false factual assertions as opposed to statements of mere opinion warranted dismissal of action); accord *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995) (the court determined, as a matter of law, that certain statements were not defamatory and instead represented nothing more than "statements of personal viewpoint" and "expressions of subjective views" because plaintiff failed to set forth provably false assertions of objective facts).

5. An employer's statements about an employee's failure to perform in a competent manner are protected statements of opinion that are not properly the subject of a libel action. *Banks v. Dominican College*. 35 Cal. App. 4th 1545, 1554 (1995) (court affirmed the pretrial dismissal of a defamation claim brought by a probationary teacher when her clinical teaching assignment was terminated holding that the college's assertions about the teacher's failure to "perform her duties competently" and lack of "fitness" were protected statements of opinion.).

6. The statements allegedly made by Defendant regarding Plaintiff's performance were also qualifiedly privileged.

7. A communication is privileged when made to:

> [A] person interested therein (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information. Cal. Civ. Code § 47(c).

8. Statements made in furtherance of an employer's legitimate business interests are entitled to a qualified privilege under California Civil Code § 47(c). *Williams v. Taylor*, 129 Cal. App. 3d 745, 752 (1982) (court held that allegedly defamatory communications made by plaintiff's

former employer (a body shop) to two insurance adjusters who referred business to the body shop were qualifiedly privileged); see also *Lesperance v. North Am. Aviation. Inc.*, 217 Cal. App.2d 336, 341 (1963) (court recognized that allegedly defamatory publications made by plaintiff's former employer to prospective employers were qualifiedly privileged); *Roemer v. Retail Credit Co.*, 3 Cal. App. 3d 368 (1970) (publications made by mercantile agency to prospective employers held qualifiedly privileged).

[page 5] 9. Moreover, "[i]f the publication is made for the purpose of protecting the interest in question, the fact that the publication is inspired in part by resentment or indignation at the supposed misconduct of the person defamed does not constitute an abuse of the privilege. *Williams*, 129 Cal. App. 3d at 752-53.

10. Plaintiff has the affirmative burden of properly alleging actual malice on the part of Defendant so as to overcome the privilege. *Robomatic, Inc. v. Vetco Offshore*, 225 Cal. App. 3d 270, 276 (1990); see also *Lundquist v. Reusser*. 7 Cal. 4th 1193 (1994) (plaintiff alone bears the burden of defeating qualified privilege). Plaintiff has failed to fulfill that burden as he simply concluded, without factual support, that Defendant's statements regarding his performance were made in bad faith and with actual malice. Plaintiff fails to plead a single fact from which to infer any bad faith or malice on the part of Defendant. In the absence of such allegations, the communications are presumed to be without malice so that the statutory privilege attaches as a matter of law. *Robomatic*, 225 Cal. App. 3d at 276; *Martin v. Kearney*. 51 Cal. App. 3d 309, 312 (1975); *Dorn v. Mendelzon*, 196 Cal. App. 3d 933, 944 (1987).

11. Plaintiff has failed to properly allege publication by Defendant of the statements at issue and may not rely on the doctrine of self-publication.

12. A plaintiff cannot assert a "self-published" defamation claim in the employment context absent the existence of a "negative job reference" from the employer. *Davis v. Consolidated Freightways*, 29 Cal. App. 4th 354, 373 (1994);

see also *Lin, supra*, 68 F.E.P. (BNA) at 576. Plaintiff has not alleged any such publication by Defendant to any prospective employers.

DATED July 2, 1998 s/ Soussan G. Bruguera
Honorable Soussan G. Bruguera
Judge, Los Angeles Superior Court

REPORTER'S TRANSCRIPT OF HEARING OF JUNE 9, 1998

BEFORE THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES DEPARTMENT 33

Case No.: BC179376 Case Name: That vs. 3D Systems
Los Angeles, California; Tuesday, June 9, 1998
Hon. SOUSSAN G. BRUGUERA, Judge
Department No. 33
Reporter: CARMEN J. GARROD, CSR No. 4009
Time: 9:25 a.m. (Appearances[1] as heretofore noted.)

The Court: Good morning. Let's do the demurrer on That vs. 3D Systems, Inc. I kept it to last because we need a little conversation.
Ms. Chevalier: Alisa Chevalier for defendant and moving party, 3D Systems.
Mr. That: Dinh Ton That for himself.
The Court: Good morning. So Mr. That, is there anything that you want to say that you have not put in your papers ? Because I've read your papers very carefully. So I just need to know what you want to tell me that you haven't already told me in you papers.
Mr. That: Yes. The defendant filed a reply memo.
The Court: Yes, I got it.
Mr. That: And I wrote a few pages, but I don't know --
The Court: In reply ?
Mr. That: Yes.
The Court: Why don't you tell me what you said.
Mr. That: In this ... (indicating) ?
The Court: Yes.
Mr. That: Because of the reply the defendant raises a few new issues. So for shortness of time I may not be able to be

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[1] APPEARANCES for Plaintiff-Appellant: IN PROPRIA PERSONA, ... for Defendants-Respondents: Troop Meisinger Steuber & Pasich, LLP, by ALISA M. CHEVALIER, Attorney at law

complete in my answer.

First of all, plaintiff construes his status as broad enough to include not only race, but race, ethnic origin, etc. In other words, in the documents of defendant they only limit themself to race, racial discrimination. I construe my status as broad enough to include race and age. That's one point I'd like to make.

The other point, they mention a four-element proof for prima facie discrimination, and defendant says in the case of Mixon vs. F.E.H.A. (sic), they said that I did not conform to element number 4 of that step of the four-element proof.

Plaintiff disagrees with that, because the element three and four of that proof are not independent. They go together to show differential treatment.

In other words, the reason you need number 4 is because three and four go together to show differential treatment.

In the case of Mixon, this was a cause of action that arose from the termination of the employment of the plaintiff. In my case I am not centering my claim on the termination of my employment -- plaintiff is not, of his employment, but there are three groups of violations and only the third group relies on [Ca.Gov.Code] section 12940(a), the standard discrimination clause, and there the differential treatment is not in the termination but in the "denial of the opportunities to exercise one's skills in a manner to enhance one's career" of defendant.

In other words, te opportunities -- it's not the termination of the employment, and there was the differential; treatment because it was differential between plaintiff and Bryan Bedal, another employee, which employee was not a member of the [protected classes under consideration. So that is a differential treatment.

So when defendant says that, you know, that he has not satisfied element number 4, I think that three and four go together. And plaintiff claims that he has shown differential treatment.

So the other question is defendant also mentions the fact that plaintiff was employed at will and therefore that the fact that he was employed at will gives the latitude for defendant

to treat, you know, plaintiff the way plaintiff was treated.

The point of this point has already been approached in the original complaint. In the original complaint, in lines 5 through 12, page 5 of plaintiff's memo of points and authorities in opposition to the demurrer, plaintiff discussed the issues of group A, B, and C, temporary, non-temporary employees, and employment-agency temporaries; and plaintiff had already made that point that to treat -- to hire someone into a group of non-differential[2] employees, to treat them as non-temporary employees, would be a violation of the anti-discrimination laws. Employment at will does not give a right to violate the antidiscrimination laws. If an employer were to have a group of employees, were discriminating against some of its employees and terminated them, such employer could not say, oh, because they are all at will I can do what I want with this particular subset of employees. That would still be a violation of the antidiscrimination laws.

To summarize the issue of this first cause of action, antidiscrimination, plaintiff's complaint was not that his employment was terminated, but he was hired as an at-will regular employee, when defendant's real intent was for defendant to employ plaintiff temporarily only; that this was done in an abuse of plaintiff's status to prop up defendant's appearance of compliance with the antidiscrimination laws; to wit, the presentation of plaintiff to an all-hands staff meeting as a newly hired regular employee as opposed to a contractor; and that the effect of this would be to discourage others from filing legitimate complaints of discrimination or to cover up ongoing discrimination; that plaintiff was treated, however, like a temporary worker and was denied opportunity to exercise his skills in a manner to enhance his

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[2] Petitoner's editorial note: on June 23, 1998 (see pages 163-164 of the Record on Appeal-Clerk's Transcript), plaintiff requested that "... group of non-differential employees, to treat them as ...non-temporary employees, would be a violation of the ..." be amended and replaced by "group of non-temporary employees, to treat them as ... temporary employees, would be a violation of the ..."

career at defendant, whereas as other regular at-will employees, such as Bryan Bedal, got such opportunities.

Now, this is only one set of violations. Now, during the termination process defendant compounded this violation by unfairly blaming plaintiff --

The Court: You've already told me that in your papers and in you complaint.

Mr. That: In the case of the defamation there is not much to be added. One of the things is that defendant, for the first time in its reply, refers to its agents. In other words, in the previous paper the defendant did not use the expression "agents" in its reply. For the first time defendant mentions agents.

Of course, under the doctrine of respondeat superior and Civil Code Section 2388[3], defendant is liable for the acts or omissions of its employees within the scope of their employment, as is the case here.

Plaintiff does not admit, however, that the defendant is without fault of its own. In other words, there is no admission that only the employees were responsible.

And furthermore, if the agents tainted the statement of fact with their own opinion, there is still liability for the factual content of the statements.

And then in the case of one of the references mentioned in that -- it was Lin versus Circuit City -- and in Lin -- if Your Honor would read Lin vs. Circuit City.

The Court:: I know about Lin even though it wasn't attached like it was supposed to be. Go ahead.

Mr. That: That in that reference --

The Court: I read it, so you don't need to go through the facts.

Mr. That: I wanted to point out one element in Lin vs. Circuit City. The court itself recognized that to be asked about the reason for leaving a former employer is sufficient

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[3] Petitioner's editorial note: on June 23, 1998 (see pages 163-164 of the Record on Appeal-Clerk's Transcript) plaintiff asked that the number 2388 be corrected to 2338 due to plaintiff's mistaken citation of the section number

evidence of "strong compulsion". This is recognized in Davis vs. Consolidated Freightways.

In other words, another point that, in Lin vs. Circuit City, the employer, Circuit City, presumably out of self interest, treated its evaluation not as an opinion but as a statement of facts because it performed what they call salt audit of the employee, and that was not an opinion. That was, you know, a statement of fact.

So that is an example of an employer who openly evaluates its employees in its statement of facts.

And then in the section two of the reply defendant mentions the format of the pleading was not perfect. Plaintiff says that he included allegations --

The Court: You don't have to read what plaintiff said. I read it. Tell me what your response is.

Mr. That: Right. The response is that in the Amended Complaint plaintiff includes allegations of material fact directly, when possible, and when -- indirectly, when not possible.

In other words, for the intent of the defendant, because of the difficulty of showing the intent, it is necessary to show it indirectly. And then facts alone, I mean material facts alone, cannot state a cause of action. And therefore, one has to combine the fact with the law, and that requires some inference. And so that is the reason why you need an inference. And that's about it.

The Court: Thank you.

So Counsel, you want this sustained without leave to amend, right ?

Ms. Chevalier: Yes, Your Honor.

The Court: This is -- I believe it's the first amended complaint, so this was plaintiff's second try.

Ms. Chevalier: The original complaint asserted four causes of action, and Judge Cooper sustained --

The Court: I got it, but I have a question.

Ms. Chevalier: Okay.

The Court: Thinking through all the appellate cases on demurrers -- and are you comfortable with the sustain without leave to amend, or do you think that it would be

best to give plaintiff another chance to amend a pleading that falls short of what's required ?

Ms. Chevalier: Well, Your Honor, I'm very familiar with the standard on appeal for the the court sustaining a demurrer without leave to amend. And I believe the standard is that if there is a possibility that the plaintiff can amend his complaint to assert a proper cause of action, then it's abuse of discretion to sustain it without leave to amend.

I'm sure Your Honor has seen both the original complaint and the first amended complaint alleged in excruciating detail, and I'm quite comfortable with the fact that plaintiff has alleged every fact that exists that would support his cause of action. And as we asserted in our papers, I believe that even if every fact that he alleges in there were true, which obviously we deny, he still does not state either a cause of action for race discrimination or deformation [defamation].

The Court: Then I need you to take notes because I want you to give notice.

Ms. Chevalier: Okay.

The Court: So the demurrer to the first cause of action will be sustained without leave to amend as plaintiff having failed to specify allegations of discriminatory conduct or statements directed to him or to identify a racially hostile work environment.

And the demurrer to the --

Ms. Chevalier: Can you hold on one second.

The Court: Sure.

Ms. Chevalier: You said he failed to specify allegations of discriminatory conduct or statement --

The Court: Statements directed at him or to identify a racially hostile work environment.

And the demurrer to the second cause of action for deformation [defamation] is sustained without leave. The statements in the performance appraisals are protected statements of opinion. That's it.

And you'll give notice, and I need you to do an order that includes what my ruling is and the argument that you have given in your demurrer as well so that the order will be

complete as far as the law is concerned, okay ? I want a long order that states --- because I'm sustaining without leave to amend based on the papers in your demurrer as well as what I just stated. So the demurrer will incorporate all the argument that you've given me in your demurrer and the law, okay ? So it's going to be a very long order.

Ms. Chevalier: Understood.

The Court: Submit it to this Department within 10 days.

Ms. Chevalier: Thank you, Your Honor.

(The proceedings were concluded.)[4]

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[4] Reporter's Certificate.

State of California, County of Los Angeles /ss.

I, CARMEN J. GARROD, CSR #4009, Official Court Reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the foregoing pages ..., comprise a full, true and correct transcription of the proceedings held in the above-entitled matter on June 9, 1998 ... . Dated this 4th day of January 1999. s/ Carmen J. Garrod CSR No. 4009, Official Court Reporter.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date: 02/06/98 Dept.33

Honorable FLORENCE-MARIE COOPER, Judge

R. VILLARREAL, Deputy Clerk

Deputy Sheriff: C. KIMBELL, CA Reporter: P. CUNEO

8:30 am BC179376

DINH TON THAT Plaintiff's Counsel

Dinh Ton That (X)

VS

3D SYSTEMS INC Defendant's Counsel

Alisa M. Chevalier (X)

NATURE OF PROCEEDINGS

HEARING on Demurrer of Defendant 3D Systems, Inc.

The moving party and opposing party are in possession of the Court's Tentative Ruling and represent to the Court that they will submit on the tentative.

The matter is deemed submitted and the Tentative Ruling is adopted as the order of the Court as indicated below and more fully reflected in the Court's Tentative, a copy of same is filed this date.

FIRST CAUSE OF ACTION - FRAUD
Sustained without leave to amend.
SECOND CAUSE OF ACTION - DISCRIMINATION:
Sustained, 30 days leave to amend.
THIRD CAUSE OF ACTION - DEFAMATION:
Sustained, 30 days leave to amend.
FOURTH CAUSE OF ACTION - BAD FAITH:
Sustained without leave to amend.
Notice of ruling is waived.

MINUTES ENTERED
02/06/98
COUNTY CLERK

REPORTER'S TRANSCRIPT OF HEARING OF FEBRUARY 6, 1998

BEFORE THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Los Angeles, California; Friday, February 6,1998
8:55 a.m. Department 33
Hon. FLORENCE-MARIE COOPER, Judge
Case No.: BC179376 Case Name: That vs. 3D Systems
Reporter: PAT CUNEO
(Appearances[1] as heretofore noted.)

The Court: Number 1, please, That vs. 3D Systems.
Ms. Chevalier: Good morning, Your Honor. Alisa Chevalier for defendant #D Systems.
The Court: Good morning.
Mr. That: Dinh Ton That in pro per.
The Court: Good morning.

This matter is on calendar for a demurrer to the Complaint. I faxed out a tentative ruling yesterday sustaining as to a couple of causes of action, giving leave to amend on the Second and Third.

Who would like to be heard ?

Ms. Chevalier: Well, actually, Your honor, we spoke this morning before the hearing and I think that we might be able to resolve our differences.
The Court: Excellent.
Ms. Chevalier: Correct me if I am wrong, Mr. That, but I think what we discussed is we would submit to the tentative; and if you could give him more than ten days to amend, I think we might be able to work it out.
The Court: Okay.
Ms. Chevalier: If he had about 30 days to amend.

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[1]. APPEARANCES for Plaintiff-Appellant: IN PROPRIA PERSONA; ... for Defendants-Respondents: Troop Meisinger Steuber & Pasich, LLP, by ALISA M. CHEVALIER, Attorney at law

The Court: All right. I'll make the tentative the order of the court except that the plaintiff will give 30 days leave to amend the complaint if you choose to do so. Okay ?
Ms. Chevalier: Thank you, Your Honor.
The Court: Thank you very much.
(Proceedings in this matter were concluded.)[2]

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[2] Reporter's Certificate.
State of California, County of Los Angeles /ss.
I, PAT CUNEO, CSR #1600, Official Reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the foregoing pages, 1 and 2, inclusive, comprise a full, true and correct transcript of the proceedings held in the matter of the above-entitled cause in Department 33 on Friday, February 6, 1998. Dated this 14th day of October 1998. s/ Pat Cuneo, CSR No. 1600, Pat Cuneo, Official Reporter.

67 L

FACSIMILE TRANSMISSION COVER SHEET
LOS ANGELES SUPERIOR COURT
Department 33
Judge Florence-Marie Cooper
Fax Number: (213) 625-8726
Phone Number: (213) 974-5641

****

To: Alisa M. Chevalier, Esq.
Fax Phone No: (310) 443-7599

To: Dinh Ton That
Fax Phone No: (714) 786-5197

Re: That v. 3D Systems, BC 179376
Motion Set: Demurrer to Complaint
Date of hearing: February 6, 1998

Date Sent: February 5, 1998
Time sent: 9:00 am
No. Of Pages: 2
(including cover page)

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The following is a copy of the Court's Tentative Ruling(s) on the matter(s) you have on calendar in Department 33.

Please call both the Court and Opposing Counsel and advise whether or not you wish to submit on the tentative and waive oral argument. If you cannot reach the Court Staff, you may leave a message on the Court's Voicemail system.

If you waive argument, a Minute Order reflecting the Court's Final Ruling will sent to you by mail.

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First Cause of Action - Fraud:
Sustained without leave to amend.

Plaintiff alleges that defendant hired him as a permanent employee, concealing from him its true intent to hire him only temporarily, in an effort to comply with governmental anti-discrimination requirements. Under *Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174, 1184*, no cause of action for fraud can be stated as part of a wrongful termination action.

Plaintiff, however, appears to be alleging fraud in the inducement. There are two problems with this attempt. First, he does not plead that an actual promise of "permanent employment" was made, which induced him to accept the job. Second, he could not so plead, inasmuch as the terms of his employment agreement expressly state that he is employed "at will". Under the circumstances, no cause of action for fraud will lie.

Second Cause of Action - Discrimination
Sustained, ten days' leave to amend.

Plaintiff speculates that the reason he was both hired and terminated was related to anti-discrimination legislation: he was apparently brought on as part of defendant's efforts to comply with some sort of quota, and then terminated when he was no longer needed for that purpose. The entire cause of action is made up of speculation and guesswork, and does not contain any allegations of discriminatory conduct or statements directed at him, nor any racially or otherwise hostile environment in the work place. Plaintiff is given leave to amend to plead such allegations, if he can do so.

Third Cause of Action - Defamation
Sustained, ten days' leave to amend.

Plaintiff does not allege any defamatory statements published about him by defendant. The evaluation refers to an evaluation apparently given to an employment recruiter,

but does not plead the words that were spoken. Whether a statement is defamatory is a question of law for the Court, and the alleged libelous statement must be precisely stated in the Complaint to withstand demurrer.

The allegations which are recited in the Complaint make it likely that whatever statements were made were privileged, pursuant to Civil Code § 47(c), but the court will give plaintiff leave to amend.

Fourth Cause of Action - Bad Faith:
Sustained without leave to amend.

Plaintiff was employed by defendant at will. A cause of action for breach of the covenant of good faith and fair dealing cannot be stated under the circumstances.

UNITED STATES CONSTITUTION

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the

members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV

Section. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of

servitude.

Section. 2. The Congress shall have power to enforce this article by appropriate legislation.

UNITED STATES CODE

28usc1257(a)
Section 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

42usc1981
Section 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses,and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42usc2000e
Section 2000e. Definitions

For the purposes of this subchapter -

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for

employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of suchan organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of suchother labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization -

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended (29 U.S.C. 151 et seq.), or the Railway Labor Act, as amended (45 U.S.C. 151 et seq.);

(2) although not certified, is a national or internationallabor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or (3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees

within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or systemboard, or joint council subordinate to a national orcx international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401 et seq.), and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin

Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf and:s Act (43 U.S.C. 1331 et seq.).

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided,

That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements inregard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

Section 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization -

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 (50 U.S.C. 781 et seq.).

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if -

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United
States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment

pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or

employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if -

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense

against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act (21 U.S.C. 801 et seq.) or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not

be challenged in a claim under the Constitution or Federal civil rights laws -

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had -

(I) actual notice of the proposed judgment or order - sufficient to apprise such person that such judgment or ordermight adversely affect the interests and legal rights of such person and that an opportunity was available to presentobjections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to -

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order describaragraph (1) shall be brought in the court, and if possible beforethe judge, that entered such judgment or

order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28.

Section 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion,

sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

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United States Code
TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 21 - CIVIL RIGHTS
SUBCHAPTER VI - EQUAL EMPLOYMENT OPPORTUNITIES

Section 2000e-7. Effect on State laws

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

CALIFORNIA CONSTITUTION

ARTICLE 1 DECLARATION OF RIGHTS

SECTION 1. All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

SEC. 2. (a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

CALIFORNIA CODES
CIVIL CODE
SECTION

43. Besides the personal rights mentioned or recognized in the Government Code, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.

44. Defamation is effected by either of the following:
(a) Libel.
(b) Slander.

45. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

45a. A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement,

innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code.

46. Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
4. Imputes to him impotence or a want of chastity; or
5. Which, by natural consequence, causes actual damage.

47. A privileged publication or broadcast is one made:

(a) In the proper discharge of an official duty.

(b) In any (1) legislative proceeding, (2) judicial proceeding,
(3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows:

(1) An allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to the person making the allegation or averment within the meaning of

this section unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action.

(2) This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified in Section 250 of the Evidence Code or evidence that is property of any type specified in Section 2031 of the Code of Civil Procedure.

(3) This subdivision does not make privileged any communication made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies.

(4) A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.

(c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, the prospective employer. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section

527.3 of the Code of Civil Procedure or any other provision of law.

(d) (1) By a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued.

(2) Nothing in paragraph (1) shall make privileged any communication to a public journal that does any of the following:

(A) Violates Rule 5-120 of the State Bar Rules of Professional Conduct.

(B) Breaches a court order.

(C) Violates any requirement of confidentiality imposed by law.

(e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.

CALIFORNIA GOVERNMENT CODE

SECTION

12920. It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and

adversely affects the interest of employees, employers, and the public in general.

Further, the practice of discrimination because of race, color, religion, sex, marital status, national origin, ancestry, familial status, disability, or sexual orientation in housing accommodations is declared to be against public policy.

It is the purpose of this part to provide effective remedies that will eliminate these discriminatory practices.

This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state.

12920.5. In order to eliminate discrimination, it is necessary to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons. To that end, this part shall be deemed an exercise of the Legislature's authority pursuant to Section 1 of Article XIV of the California Constitution.

12921. (a) The opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation is hereby recognized as and declared to be a civil right.

(b) The opportunity to seek, obtain, and hold housing without discrimination because of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, disability, or any other basis prohibited by Section 51 of the Civil Code is hereby recognized as and declared to be a civil right.

12940. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental

disability, medical condition, marital status, sex, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental
disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations.

(2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a
manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.
Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either of the following:

(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or

facility, consistent with the rules and regulations adopted by the commission.

(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam-era veterans.

(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation of any person, to exclude, expel or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation of the person discriminated against.

(d) For any employer or employment agency, unless specifically acting in accordance with federal equal employment opportunity guidelines and regulations approved by the commission, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or

discrimination as to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation, or any intent to make any such limitation, specification or discrimination. Except as provided in the Americans with Disabilities Act of 1990 (Public Law 101-336) and the regulations adopted pursuant thereto, nothing in this subdivision shall prohibit any employer from making, in connection with prospective employment, an inquiry as to, or arequest for information regarding, the physical fitness, medical condition, physical condition, or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger
his or her health or safety or the health or safety of others.

(e) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code that prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(f) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or
assisted in any proceeding under this part.

(g) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(h) (1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee , an applicant, or a person providing

services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should
have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

(2) The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment.

(3) (A) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The definition of "employer" in subdivision (d) of Section 12926 applies to all provisions of this section other than this subdivision.

(B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does not include a religious association or corporation not organized for private profit.

(C) For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.

(4) For purposes of this subdivision, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

(B) The person is customarily engaged in an independently established business.

(C) The person has control over the time and place the work is performed, supplies the tools and instruments used

in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

(i) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(j) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time
or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer or other entity covered by this part.

Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance. (k) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.

(l) For an employer or other entity covered by this part, to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic.

12940.1. For the purposes of paragraph (1) of subdivision (a) of Section 12940, it shall be presumed that an individual with heart trouble, as referred to in Section 3212 of the Labor Code, applying for either a firefighter position or participation in an apprenticeship training program leading to employment in that position, where the actual duties require physical, active fire suppression, or a law enforcement position, the principal duties of which clearly consist of active law enforcement, could not perform his or her duties in a manner which would not endanger his or her health or safety or the health or safety of others. This presumption may be overcome by the applicant or the department proving, by a preponderance of the evidence, that the applicant would be able to safely perform the job. Law enforcement, for the purposes of this section, means police officer, deputy sheriff, or sheriff whose principal duties consist of active law enforcement service.

12941. (a) It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action.
This section shall not be construed to make unlawful the rejection or termination of employment where the individual applicant or employee failed to meet bona fide requirements for the job or position sought or held, or to require any changes in any bona fide retirement or pension programs or existing collective-bargaining agreements during the life of the contract, or until January 1, 1980, whichever occurs first, nor shall this section preclude such physical and medical examinations of applicants and employees as an employer may make or have made to determine fitness for the job or position sought or held.

Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, and trade schools shall not, in and of themselves, constitute a violation of this section.

(b) This section shall not limit the right of an employer, employment agency, or labor union to select or refer the better qualified person from among all applicants for a job. The burden of proving a violation of this section shall be upon the person or persons claiming that the violation occurred.

12941.1. The Legislature hereby declares its rejection of the court of appeal opinion in Marks v. Loral Corp. (1997) 57 Cal.App.4th 30, and states that the opinion does not affect existing law in any way, including, but not limited to, the law pertaining to disparate treatment. The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination. The Legislature further reaffirms and declares its intent that the courts interpret the state's statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers. Nothing in this section shall limit the affirmative defenses traditionally available in employment discrimination cases including, but not limited to, those set forth in Section 7286.7 of Title 2 of the California Code of Regulations.

12945. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification:

(a) For any employer, because of the pregnancy, childbirth, or related medical condition of any female employee, to refuse to promote her, or to refuse to select her for a training program leading to promotion, provided she is able to complete the training program at least three months prior to the anticipated date of departure for her pregnancy leave, or to discharge her from employment or from a training program leading to promotion, or to discriminate against her in compensation or in terms, conditions, or privileges of employment.

(b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions either:

(1) To receive the same benefits or privileges of employment granted by that employer to other persons not so affected who are similar in their ability or inability to work, including to take disability or sick leave or any other accrued leave that is made available by the employer to temporarily disabled employees. For
purposes of this section, pregnancy, childbirth, and related medical conditions are treated as any other temporary disability. However, no employer shall be required to provide a female employee disability leave on account of normal pregnancy, childbirth, or related medical condition for a period exceeding six weeks. This section shall not be construed to require an employer to provide his or her employees with health insurance coverage for the medical costs of pregnancy, childbirth, or related medical conditions. The inclusion in any health insurance coverage of any provisions or coverage relating to medical costs of pregnancy, childbirth, or related medical condition sshall not be construed to require the inclusion of any other provisions or coverage, nor shall coverage of any related medical conditions be required by virtue of coverage of any medical costs of pregnancy, childbirth, or other related medical conditions.

(2) To take a leave on account of pregnancy for a reasonable period of time not to exceed four months. The employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions. This paragraph shall not be construed to limit the provisions of paragraph (1) of subdivision (b).

An employer may require any employee who plans to take a leave pursuant to this subdivision to give the employer reasonable noticeof the date the leave shall commence and the estimated duration of the leave.

(c) (1) For any employer, including both employers subject to and not subject to Title VII of the federal Civil Rights Act of 1964, to refuse to provide reasonable accommodation for an employee for conditions related to pregnancy, childbirth, or related medical conditions, if she so requests, with the advice of her health care provider.

(2) For any employer, including both employers subject to and not subject to Title VII of the federal Civil Rights Act of 1964, who has a policy, practice, or collective bargaining agreement requiring or authorizing the transfer of temporarily disabled employees to less strenuous or hazardous positions for the duration of the disability to refuse to transfer a pregnant female employee who so requests.

(3) For any employer, including both employers subject to and not subject to Title VII of the federal Civil Rights Act of 1964, to refuse to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where thattransfer can be reasonably accommodated. However, no employer shall be required by this section to create additional employment that the employer would not otherwise have created, nor shall the employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job.

(d) This section shall not be construed to affect any other

provision of law relating to sex discrimination or pregnancy, or in any way to diminish the coverage of pregnancy, childbirth, or medical conditions related to pregnancy or childbirth under any other provisions of this part, including subdivision (a) of Section 12940.

(e) Except for subdivision (c) and paragraph (2) of subdivision (b), this section is inapplicable to any employer subject to Title VII of the federal Civil Rights Act of 1964.

CALIFORNIA CODES
LABOR CODE

1050. Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after an employee has voluntarily left such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor.

1051. Except as provided in Section 1057, any person or agent or officer thereof, who requires, as a condition precedent to securing or retaining employment, that an employee or applicant for employment be photographed or fingerprinted by any person who desires his or her photograph or fingerprints for the purpose of furnishing the same or information concerning the same or concerning the employee or applicant for employment to any other employer or third person, and these photographs and fingerprints could be used to the detriment of the employee or applicant for employment is guilty of a misdemeanor.

1052. Any person who knowingly causes, suffers, or permits an agent, superintendent, manager, or employee in his employ to commit a violation of sections 1050 and 1051, or who fails to take all reasonable steps within his power to prevent such violation is guilty of a misdemeanor.

1053. Nothing in this chapter shall prevent an employer or an agent, employee, superintendent or manager thereof from furnishing, upon special request therefor, a truthful statement concerning the reason for the discharge of an employee or why an employee voluntarily left the service of the employer. If such statement furnishes any mark, sign, or other means conveying information different from that expressed by words therein, such fact, or the fact that such statement or other means of furnishing information was given without a special request therefor is prima facie evidence of a violation of sections 1050 to 1053.

1054. In addition to and apart from the criminal penalty provided any person or agent or officer thereof, who violates any provision of sections 1050 to 1052, inclusive, is liable to the party aggrieved, in a civil action, for treble damages. Such civil action may be brought by such aggrieved person or his assigns, or successors in interest, without first establishing any criminal liability under this article.

2922. An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month.

FLORIDA STATUTES

Section 768.095 *Employer immunity from liability: disclosure of information regarding former employees* -- An employer who discloses information about a former employee's job performance to a prospective employer of the former employee upon request of the prospective employer or of the former employee is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from civil liability for such disclosure or its consequences. For purposes of this section the presumption of good faith is rebutted upon a showing that the information disclosed by the former employer was knowingly false or deliberately misleading, was rendered with malicious purpose, or violated any civil right of the former employee protected under Chapter 760. [History: Ch. 91-165]

UNIVERSAL DECLARATION OF HUMAN RIGHTS

{Adopted and proclaimed on December 10, 1948 by the General Assembly of the United Nations)

PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and

freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore,

THE GENERAL ASSEMBLY

proclaims

THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1.
All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one-another in a spirit of brotherhood.

Article 2.
Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3.
Everyone has the right to life, liberty and security of person.

Article 4.
No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5.
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6.
Everyone has the right to recognition everywhere as a person before the law.

Article 7.
All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8.
Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9.
No one shall be subjected to arbitrary arrest, detention or exile.

Article 10.
Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.
(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees

necessary for his defence.
(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12.
No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation Everyone has the right to the protection of the law against such interference or attacks.

Article 13.
(1) Everyone has the right to freedom of movement and residence within the borders of each state.
(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14.
(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15.
(1) Everyone has the right to a nationality.
(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16.
(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
(2) Marriage shall be entered into only with the free and full

consent of the intending spouses.
(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17.
(1) Everyone has the right to own property alone as well as in association with others.
(2) No one shall be arbitrarily deprived of his property.

Article 18.
Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19.
Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20.
(1) Everyone has the right to freedom of peaceful assembly and association.
(2) No one may be compelled to belong to an association.

Article 21.
(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
(2) Everyone has the right to equal access to public service in his country.
(3) The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal

suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22.
Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23.
(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24.
Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25.
(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26.
(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27.
(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28.
Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29.
(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
(2) In the exercise of his rights and freedoms, everyone shall

be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30.
Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.